United States Court of Appeals

for the Second Circuit



APPELLANT'S BRIEF

ORIGINAL 76-1194

United States Court of Appeals
FOR THE SECOND CIRCUIT

B/S

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

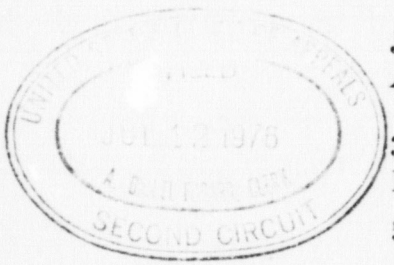
v.

PHILIP RASTELLI, et al.,
Defendants,

JOHN JOSEPH SUTTER, Esq.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLANT JOHN JOSEPH SUTTER



JAMES R. MOFFATT, Esq.
Attorney for Defendant-Appellant, John Joseph Sutter, Esq.
33 Willis Avenue
Mineola, New York 11501
516—747-5800

JAMES R. MOFFATT
GINO PAPA
Of Counsel

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

PHILIP RASTELLI, et al.,

Defendants,

JOHN JOSEPH SUTTER, Esq.,

Defendant-Appellant.

BRIEF ON BEHALF OF APPELLANT JOHN JOSEPH SUTTER

Preliminary Statement

This is an appeal by John Sutter, from an order entered in the United States District Court for the Eastern District of New York on March 30, 1976, by the Honorable Thomas J. Platt, District Court Judge, imposing a fine in the sum of $500.00 per day for a total sum of $1,500.00 the appellant allegedly caused in the commencement of the above captioned trial. The fine was paid.

Statement of Facts

The appellant was the attorney of record for the defendant, Philip Rastelli, in a matter scheduled for trial on March 29, 1976, before the Honorable Thomas J. Platt. The facts as related in Judge P...tt's memorandum decis...n

(appendix pages 145a-152a), are not seriously in dispute except as hereinafter noted.

The appellant, John Joseph Sutter, is an attorney with an active trial practice in both the federal and state courts. On February 28, 1976, Mr. Sutter was retained to try the case of the People of the State of New York against Gregory Charmont in the Nassau County Court before Judge Alfred F. Samenga. Appellant was ordered to trial on short notice due to the fact that the defendant's present counsel suddenly became unavailable on the eve of trial. The trial which commenced on March 8, 1976 included two counts of attempted murder in the first degree of two police officers. Conviction could have subjected Charmont to a sentence of life imprisonment. Appellant was ordered to commence trial and did so in view of the fact that he believed on the bases of two week estimates of both the court and prosecutor that the matter would be concluded well in advance of March 29, 1976 (pages 46a-47a).

The District Court scheduled a pre-trial conference for March 19, 1976. Stephen Willson, Esq., an attorney in Mr. Sutter's office, appeared and in substance applied for an adjournment because Mr. Sutter was still actively engaged in the attempted murder trial before Judge Samenga in Nassau County Court and, consequently, Mr. Rastelli wished to discharge Mr. Sutter and retain the firm of Saxe, Bacon & Bolan, P.C. The court said that substitution of counsel would be permitted only on condition new counsel were prepared to proceed with the trial on the scheduled date of March 29th, some ten days later (page 10a).

On March 24, 1976, Mr. Cohn of the firm of Saxe, Bacon & Bolan, P.C. suggested that because defendant Louis Rastelli had been granted a severance and the trial estimate shortened, that a one-week adjournment might be arranged (concurred in by the government (page 40a))

whereby new counsel could be substituted without disturbing the estimated completion date (page 42a).

On Friday, March 26th, the District Court was served with a petition for writ of mandamus to the Court of Appeals by the firm of Saxe, Bacon & Bolan, P.C. as directed and ordered by Judge Platt (page 44a) seeking a continuance of this matter until April 5, 1976, so that their firm could come in and represent Mr. Rastelli. On Friday, March 26th the appellant had served upon the District Court a detailed affidavit explaining his engagement in the Nassau County Court before Judge Samenga and further on the 29th of March the appellant's associate, Mr. Willson, did appear in court before Judge Platt, but the client, Mr. Rastelli, did not want to go to trial with Mr. Willson (pages 46a-51a; 56a-57a).

The court was advised on the morning of March 29th that the Court of Appeals for the Second Circuit had denied the petition for writ of mandamus stating that it did not have the power to hear the matter, but in view of the circumstances, the Court of Appeals suggested that the District Court reconsider the equities, interests and policies involved and grant the requested continuance.

The District Court then predetermined to impose a $1,000.00 per day fine upon Mr. Sutter without a hearing until he appeared (page 59a).

The court then reconsidered and imposed a contingent fine of $1,000.00 for his failure to appear and Judge Platt stated he would give Mr. Sutter an opportunity to be heard on the subject (page 66a).

On March 30, 1976, after hearing argument on behalf of Mr. Sutter, the court granted the substitution of attorney sought by defendant, Philip Rastelli, and fined Mr. Sutter $1,500.00 for the delay for March 29, 30 and 31, i.e. $500.00 per day, which the court attributed to Mr. Sutter (page 152a).

Statutes Involved

Title 18, United States Code, Section 401, provided that

> "A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) misbehavior of any of its officers in their official transactions;
>
> (3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Rules Involved

Rule 42 (b) of the Federal Rules of Criminal Procedure provides as follows:

> "(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves

> disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Rule 8 of the Individual Assignment and Calendar Rules of the United States District Court for the Eastern District of New York provides:

> "(a) Dismissal or Default. Failure of counsel for any party to appear before the court at a conference, or to complete the necessary preparations, or to be prepared to proceed to trial at the time set may be considered an abandonment of the case or failure to prosecute or defend diligently, and an appropriate order may be entered against the defaulting party either with respect to a specific issue or on the entire case.
>
> (b) Imposition of Costs on Attorneys. If counsel fails to comply with Rules 3(f), 6(f) or 9 or a judge finds that the sanctions in subdivision (a) are either inadequate of unjust to the parties, he may assess reasonable costs directly against counsel whose action has obstructed the effective administration of the court's business."

Rule 9 of the Criminal Rules of the United States District Court for the Eastern District of New York provides:

> "9. Responsibility of the United States Attorney and Defense Counsel.
>
> (a) The court has sole responsibility for setting and calling cases for trial. Neither a conflict in schedules of Assistant United States Attorneys nor a conflict in schedules of defense counsel will be ground for a continuance or delayed setting except under unusual circumstances approved by the court and called to the court's attention at the earliest practicable time. Each judge will schedule criminal trials at such times as

may be necessary to assure prompt disposition of criminal cases. The United States Attorney will familiarize himself with scheduling procedures of each judge and will assign or reassign cases in such manner that the government will be able to announce ready for trial.

Questions Presented

1. Whether counsel's failure to attend on the date scheduled in the United States District Court because he was actually on trial in a state cause is sufficient to constitute criminal contempt?

2. Whether the $1,500.00 fine imposed in the form of costs is proper under the circumstances?

POINT I

Counsel's failure to attend on the date scheduled was not a criminal contempt.

According to *United States* v. *Meyer*, 346 F. Supp. 973, 977 (D.C. Cir., 1972)) there are four elements required to support a contempt conviction under 18 United States Code 401(1):

1. misbehavior which
2. occurred in or proximate to presence of the court and which constituted
3. "obstruction of the administration of justice" and which was performed
4. with the required degree of intent.

The necessary quantum of evidence is proof beyond a reasonable doubt. (*United States* v. *Peterson*, 456 F. 2nd 1135 (10th Cir., 1972)).

Upon a fair reading of the appendix below, it is clear that the appellant, John Joseph Sutter, did not commit contempt of court before the United States District Court Judge Thomas J. Platt. Mr. Sutter's conduct was in no way accompanied by any intention to obstruct, disrupt or interfere with the administration of justice; nor does it show a wilfull disregard of an order or disobedience to the court; consequently it does not constitute a criminal contempt (See *United States* v. *Panico*, 308 F. 2d 125 (2nd Cir., 1962); *In re Williams*, 509 F. 2d 949 (2nd Cir., 1975)).

In *Sykes* v. *United States*, 444 F. 2d 928 (D.C. Cir., 1971)) the court reversed the conviction of an attorney who had been held in criminal contempt for failure to appear at the date set for trial. His failure was attributed to lapse of memory, pre-occupation with another case and confusion as to dates. In reversing the court said at page 930 thereof:

> "In the Appellant's case, however, there was no evidence that he deliberately or recklessly disregarded his obligation to the court, or that he intended any disrespect for the Court."

Mr. Sutter's problem arose after he became engaged in a state trial which commenced on March 8, 1976, when he at the time, well knew that he had a trial scheduled in the United States District Court representing the defendant Rastelli in a trial scheduled before Judge Platt on March 29, 1976. The circumstances surrounding this state trial engagement, however, belie any assertion much less any proof that Mr. Sutter acted with any deliberate disregard whatsoever for the trial date set by Judge Platt.

How Mr. Sutter's retention in the state matter came about is very relevant and it is amply stated in Mr. Sutter's affidavit (page 46a). Mr. Sutter was retained by the Charmont family on the eve of trial because defendant Charmont's trial counsel failed to appear in court on the

firm date set for trial weeks before even though the charges involved were most serious, that is, two counts of attempted murder in the first degree and even though defendant's counsel had undertaken to represent the defendant Charmont months before. Mr. Sutter and his partner Mr. Moffatt reviewed the case for four days and four nights and proceeded to trial. A jury was expressly waived for the very purpose of expediting the case. Mr. Sutter undertook the case to prevent a grave injustice by representing an innocent defendant insofar as the murder charges were concerned. After approximately six weeks of trial (instead of the two weeks as previously estimated), the defendant Charmont was acquitted of the two attempted murder counts.

Mr. Sutter's undertaking the defense in such a serious case on short notice, and by working night and day, is in the highest tradition of the state and federal bars and Mr. Sutter's representation of the defendant Charmont exemplifies the type of trial attorney Mr. Sutter is reputed to be and is and has been over the past two decades.

Mr. Sutter's conduct in the Charmont case was not disrespectful nor disruptive to the United States District Court for the Eastern District of New York in the Rastelli trial. Admittedly, Judge Platt was disturbed by the fact that Mr. Rastelli's trial would be delayed for a few days, however, Mr. Rastelli's case did proceed to trial on April 1, 1976, after the court finally allowed substitution of the firm of Saxe, Bacon & Bolan, P.C. on behalf of Mr. Sutter on March 30, 1976 within a period of time shorter than that recommended by the Court of Appeals.

In re Farquhar, 492 F. 2d 561 (D.C. Cir., 1973)) concerned an attorney who was held in contempt for returning late to the trial in which he was already engaged. Farquhar went to inform one Judge Gasch that he would not be able to attend a scheduled bond hearing because he was actively engaged in Judge Hart's courtroom. Judge

Gasch assured Farquhar that the bond matter would be expeditiously handled. Farquhar remained to participate in the bond hearing and consequently was late in returning to Judge Hart's courtroom. Prior to the recess Judge Hart told Farquhar that he might inform Judge Gasch of his actual engagement, but, "If counsel is one second late he will be fined." (492 F. 2d 561 at 563). In reversing the contempt conviction, the appellate court noted that,

> "Criminal contempt requires both a contemptuous act and a wrongful state of mind." (*In re Farquhar, supra,* page 564).

Although Farquhar was not blameless for the creation of this conflict and perhaps might have foreseen the potential for an impasse, his conduct was neither contumacious, nor was it in reckless disregard of the court's order; it did not disclose a reckless disregard for his professional duty; or show that he intended any disrespect for the court.

When Mr. Sutter accepted the state court engagement, he did so because the defendant was instructed he would have to go to trial without counsel if counsel were not prepared to go to trial. Mr. Sutter then worked for four days and nights to prepare the case and worked day and night during the trial and every weekend. He was assured by the prosecutor, Mr. Stephen Irace, and by the court, that the case would take no longer than two weeks. Mr. Sutter added an additional week to their estimate which would have meant that he could have gone to trial on March 29th as scheduled. As soon as Mr. Sutter perceived a possible conflict, he took steps which he judged appropriate to satisfy the demands of both state and federal cases.

Mr. Willson notified the United States Attorney who informed the court ten days prior to the scheduled date of trial that Mr. Sutter was actively engaged in a serious criminal matter at the direction of a New York State

County Court Judge and that the firm of Saxe, Bacon & Bolan, P.C. wanted to substitute for Mr. Sutter and that defendant Rastelli desired this change.

The hearing ordered on May 19, 1976 was not the result of "rumor" but was caused by Mr. Sutter's associate, Willson's notifying the prosecutor Mr. Bronstein (pages 116a-117a). Mr. Bronstein did inform the court before the 19th of the potential problem. During that ten day period, the firm which eventually tried the Rastelli case tried to intervene requesting merely a few days adjournment to prepare. Judge Platt refused the extension, in spite of the fact that a speedy trial had been waived by Mr. Rastelli. Saxe, Bacon & Bolan, P.C. even sought to intervene by way of mandamus to this court which on March 29, 1976 (pages 9a-36a) turned down (142a) the request and advised Judge Platt (55, etc.). Although this court refused to intervene on behalf of defendant Rastelli to change counsel, the court did suggest that Judge Platt reconsider, "the equities, interests and policies underlying his denial of the request for a continuance" (page 144a). Judge Platt stated in his order of March 30, 1976 (145, etc.) that in light of the aforementioned request he would grant the substitution of Mr. Sutter, but that Mr. Sutter would be fined $1,500.00 for the three day delay he allegedly caused.

Judge Platt further commented that had Saxe, Bacon & Bolan, P.C., spent the seven days preparing for Mr. Rastelli's trial, in lieu of making the application for mandamus, the time spent might well have been better spent (implying that the firm to be substituted could be ready for trial on the day fixed for trial).

Unfortunately, the events were not thrust upon the District Court solely by Mr. Sutter's non-attendance on the 29th; the court even refused to compromise after defendant Louis Rastelli had been severed from the joint trial thereby shortening the trial; the government attorney, Mr.

Weintraub, consented to a week's continuance (pages 40a-42a); only after this court suggested a continuance in the interests of justice did the lower court permit the substitution.

Another point of contention which apparently did not disturb the District Court Judge was the fact that Mr. Willson, of Mr. Sutter's office, stated that Mr. Sutter had perhaps not given the Rastelli case the attention it deserved. However, Judge Platt did not believe or consider for one moment that Mr. Sutter was unable to try this case because of any unpreparedness (page 41a). In fact the court commented on March 24, 1976:

> "Mr. Sutter is a well known, and as I understand it, a very competent attorney. I don't for one minute believe that Mr. Sutter is not capable of trying this case." (page 41a).

Furthermore, this statement made by Mr. Willson was incorrect. Mr. Sutter had conducted all of the interviews with Mr. Rastelli immediately after the indictment and prior to the conferences recited by the court. From the record herein it is apparent that Mr. Willson was primarily concerned about Mr. Rastelli's health. Mr. Willson as further explained in the affidavit Mr. Sutter submitted, did not, as Mr. Sutter's trial assistant, prepare the case to his liking as Mr. Willson had been seriously ill and at that time his wife was expecting their first child momentarily. (In fact the baby was born April 7, 1976.)

The point is simply that Mr. Sutter's conduct was not contumacious; it was not intentional, nor was it in any way willfully disobedient to the mandate of the District Court. Mr. Sutter's fully explained conduct, which is borne out in argument in the record below before Judge Platt, arose because Mr. Sutter deliberately and earnestly sought to secure the acquittal of an innocent defendant who was charged with two most heinous crimes. Mr. Sut-

ter's conduct does not justify the United States District Court holding him in contempt (as indeed it did) and the imposition of a $1,500.00 fine.

We respectfully submit that counsel's conduct before Judge Platt was not contemptuous as defined in Title 18, Section 401 or any of the cases decided under applicable statutes. Section 401 is pertinent because Judge Platt on the purported hearing of March 30th (page 90, etc.) recited the section number (page 92a) in response to Mr. Moffatt's request for a hearing in order to demonstrate to the court that Mr. Sutter's conduct was not intentional, willful or in any way deliberate.

It is respectfully submitted that counsel on this brief have been unable to find a statute or rule which defines or creates a priority in the scheduling of trials in the District Court of the United States over an actual trial engagement in the state courts. There certainly was no attempt on Mr. Sutter's behalf to engage himself in a state matter in order to avoid or delay a federal trial. The circumstances demonstrate that more than three weeks time was provided for by counsel in his estimation where the court and prosecutor estimated only two weeks. Defense counsel cannot be responsible for the ineffectiveness or delays caused by a prosecutor in presenting his case by an honest estimate of a trial's duration; for honest miscalculation or for unforeseen circumstances. Mr. Sutter's client was acquitted of the attempted murder charges despite the fact that he was only able to spend a few days in preparation and because he worked every day and night and every weekend during the six week trial in order to properly defend the accused.

The District Court's reliance upon the failure to inform Judge Samenga of the federal engagement was misplaced. It was not deliberately done to deceive Judge Samenga because as explained above the engagement although

urgent was not thought to be a lengthy one. Under such circumstances the certificate of engagement for March 29th was inconsequential on March 8, 1976 because everyone believed the state trial would long have been completed. Also, in view of prior conferences with Judge Samenga prior to March 8, 1976 and in view of the fact that the case had been marked ready by Charmont's prior counsel Judge Samenga informed Mr. Moffatt that the case was marked ready and must be started immediately on that date. Although Judge Samenga is a most gracious and cooperative Judge, it can hardly be urged that he would grant a delay of the Charmont trial scheduled before him because of a federal certificate of engagement which was to commence three weeks in the future. Under these intense pressures the failure to display the certificate was readily understandable.

It is respectfully submitted that upon the foregoing record counsel's conduct was not contemptuous of the court; it was in no way deliberate; it was in no way willfully or intentionally disrespectful of the District Court's mandate. Counsel's conduct did not deserve the severe punishment imposed by the District Court.

POINT II

Fine imposed as costs upon appellant in the amount of $1,500.00 was unwarranted under the circumstances.

The power to punish for contempt must be used sparingly and only when it is clearly demonstrated that the appellant's conduct is contumacious. *Parmelee* v. *Keeshin*, 294 F.2d 310 (7th Cir., 1961).

> Where . . . the purpose of the contempt proceeding is to vindicate the authority and dignity of the court, the punishment imposed should bear some reason-

able relation to the nature and gravity of the contumacious conduct. *United States* v. *Comole*, 365 F. 2d 306 at 308 (3rd Cir., 1966)

In view of the circumstances herein it is most respectfully submitted that the court was surely owed a duty to be informed of the potential delay. We respectfully submit the court realistically knew on March 19 of the potential delay to the scheduled trial of Rastelli. The court chose to ignore the reality and burdened defense counsel by forcing counsel into failing to appear on March 29, 1976. Mr. Sutter at no time intended to shirk his responsibilities. He could not in good conscience at that very time abandon a defendant who faced two life sentences in the state court. The District Court knew on the 19th that Saxe, Bacon & Bolan, P.C. wanted to substitute for Mr. Sutter and that the defendant desired this change, but the court refused to acknowledge that fact thus directing and forcing Saxe, Bacon & Bolan, P.C. to seek the unsuccessful mandamus relief.

It is submitted that the court below punished Mr. Sutter unfairly herein by imposing a $1,500.00 fine.

Upon reflection, the record indicates that perhaps Mr. Sutter should have notified Judge Platt on February 28th when he actually undertook the defense of the state matter. It is inconceivable that on February 28th anyone would believe that the Rastelli trial would have been adjourned for other than reasons of health. The record amply demonstrates that Judge Platt would not consider an adjournment of the Philip Rastelli case for any reason regardless of the consequences to the lawyers involved and no matter what the effect this would have on Mr. Rastelli's health. The court had predetermined that March 29th would be the official trial starting date of trial and nothing would be permitted to intervene (pages 42a, 100a, etc.). This is a thoroughly commendable ideal, but the frailties of man (and lawyers are men) make this ideal not always

attainable and at times justice always requires some degree of flexibility.

The court below was predisposed to punish Mr. Sutter. After the "cursary hearing" on March 30, 1976, at which time Mr. Sutter appeared. The court read its order from what appeared to be twelve pre-written typewritten pages. After the so-called hearing the Judge did not leave the bench, but proceeded to read its order in the form aforesaid. If that is to be considered a fair hearing on the issue of contempt, then it was clearly insufficient as a matter of law. (See *United States* v. *Meyer*, 462 F. 2d 827 (D.C. Cir., 1972)).

We believe the court misapprehended the circumstance throughout in any event because it never found Mr. Sutter to be in contempt. It imposed the fine in retribution for Mr. Sutter's becoming engaged on February 28th and starting a trial on March 8th on the basis that Mr. Sutter knew he had an engagement in the federal court on March 29th. (It is to be noted that Judge Platt, in reading into the record the court's order after the so-called hearing held on March 30, 1976, ordered and "imposes a fine of $500.00 a day for each day . . ." (page 126a); yet, the final written order issued which is the order appealed from reads "Accordingly the court imposes on Mr. Sutter costs of $500.00 a day for each day . . ." (page 152a)). Clearly, the punishment does not fit the conduct engaged in by Mr. Sutter.

If there was an inconvenience the court clearly contributed to it when it impaneled a jury with the knowledge that Mr. Sutter was engaged and in failing to permit substitution by granting a short continuance and in finally reconsidering the substitution only upon the request of this court.

It is respectfully submitted that this court should reverse the proceedings below and order that the fine be re-

imbursed. The record clearly speaks for itself; trial attorneys are under constant pressure and the good and respected ones are in more demand than others. Mr. Sutter does not deserve to lose the respect of this court or the state court involved as a result of the facts and circumstances heretofore detailed which are borne out by the record. Mr. Sutter's conduct was not precipitous or predetermined. If certification of engagement can be issued by the federal courts almost four months in advance of trial which are binding upon the state courts engaged in serious felony trials, then defense attorneys ought to be protected by joint federal and state legislation from sanctions declaring preferences, if any.

CONCLUSION

The order of the District Court imposing a $1,500.00 fine upon defense counsel should be reversed and the fine remitted.

Respectfully,

JAMES R. MOFFATT, Esq.
Attorney for Appellant,
John Joseph Sutter
33 Willis Avenue
Mineola, New York 11501
(516) 747-5800

JAMES R. MOFFATT
GINO PAPA
Of Counsel

UNITED STATES COURT OF APPEALS
For the Second Circuit

United States of America,
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Philip Rastelli, et al.,
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Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of New York

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Helen D'Esposito, being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 28 Ridge Road, Albertson, New York 11507
That on July 8, 1976, she served two copies of the Brief and one copy of the Appendix on

Hon. David Trager
United States Attorney for
the Eastern District of
New York
225 Cadman Plaza East
Brooklyn, New York 11201

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Helen D'Esposito

Sworn to before me this
8th day of July, 1976

Charles J. Esposito

CHARLES J. ESPOSITO
Notary Public, State of New York
No. 30-1132025
Qualified in Nassau County
Commission Expires March 30, 1977

ORIGINAL WITH AFFIDAVIT OF MAILING

76-1194

To be argued by
JOSEPHINE Y. KING

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1194

B
P/S

UNITED STATES OF AMERICA,
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—v.—

PHILIP RASTELLI, ET AL.,
Defendants,

JOHN JOSEPH SUTTER, Esq.,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE PLAINTIFF-APPELLEE

UNITED STATES COURT OF APPEALS
FILED
AUG 10 1976
DANIEL FUSARO, CLERK

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

JOSEPHINE Y. KING,
ALVIN A. SCHALL,
Assistant United States Attorneys,
Of Counsel.

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United States Court of Appeals

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Plaintiff-Appellee,

—v.—

PHILIP RASTELLI, et al.,
Defendants,

JOHN JOSEPH SUTTER, Esq.,
Defendant-Appellant.

BRIEF FOR THE PLAINTIFF-APPELLEE

Preliminary Statement

John J. Sutter, Esq., originally counsel for Philip Rastelli, appeals from an order entered in the United States District Court for the Eastern District of New York on March 30, 1976 by the Honorable Thomas C. Platt, imposing costs of $500 for each of three days delay caused by appellant's conduct. Mr. Sutter has paid the $1,500.00 costs.

Statement of the Case

The underlying litigation in which John Joseph Sutter, Esq., originally appeared involved the prosecution of defendants Philip and Louis Rastelli, Anthony DeStefano, Carl Gary Petrole and the Workmen's Mobile Lunch Association, Inc. Mr. Sutter represented Philip Rastelli.

On March 5, 1975, Philip, his brother Louis,[1] and the other defendants were indicted for allegedly engaging in a combination in restraint of trade and obstructing commerce by acts of extortion, all in violation of 15 U.S.C. § 1 and 18 U.S.C. §§ 1951, 1961, 1962(c) and 2. The next day bench warrants were issued, the Rastellis were produced in court, each pled not guilty and bail was set. The Government filed a notice of readiness on March 18, 1975 and the case was called by Judge Platt on March 21, 1975. That same day, a certificate of engagement was issued to Mr. Sutter, for trial to commence on April 4, 1975. Two days before this trial date, the court received a telegram from Mr. Sutter's office asking for an adjournment because Philip Rastelli was hospitalized (A. 62a).[2] May 9, 1975, was set as the new trial date.

From May 9, 1975, until the early part of January, 1976, the trial was postponed not less than five times at the defendants' request. On May 9, 1975, one of Rastelli's co-defendants was arraigned and pled not guilty; defendants requested an adjournment of the trial to September 5. On September 5 and November 10 and 14, 1975, the case was adjourned at defendants' request, no reason being specified in the record. Defendants then selected, and the court granted, a new trial date, January 5, 1976. But on December 29, 1975, Mr. Sutter moved for a hearing to determine Philip Rastelli's capacity to stand trial. The court ordered a physical examination; the medical report submitted by Dr. Michael Weingarten advised that defendant was capable of standing trial.

On January 5, 1976, counsel for Philip Rastelli requested a postponement of the trial to enable defendant

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[1] A motion for severance of the trial of Louis Rastelli was granted on March 29, 1976.

[2] All references are to pages of appellant's appendix.

to undergo elective surgery. The Court acceded to this request.[3] Thereupon, on January 5, 1976, all counsel agreed on a firm trial date of March 29, 1976 and certificates of engagement were issued to counsel, including Mr. Sutter (A. 120a).

Just 10 days before the scheduled trial, on March 19, 1976, Stephen Willson, Esq. an associate of Mr. Sutter, informed the Court that defendant Rastelli wished to change counsel. Michael A. Rosen, Esq., of Saxe, Bacon & Bolan, the firm proposed to be substituted, requested a thirty day adjournment (A. 10a, 16a).

I. The Proceedings of March 19, 1976.

A pretrial conference was called by the Court for March 19, 1976 because it had "heard rumors to the effect there might be some difficulty in getting the case started on March 29th." (A. 99a).[4]

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[3] However, defendant chose not to undergo the surgery for which the January 5, 1976, adjournment had been granted. Defendant, who was incarcerated following his conviction in State court, apparently declined to accept the arrangements made for him by the Clinton Correctional Facility to have the surgery performed by a private physician in a hospital.

[4] The details of how information concerning Mr. Sutter's non-availability for the Rastelli trial reached the District Court were developed at the hearing of March 30, 1976.

> Mr. Sutter: I assumed this Court was advised of my engagement and I have reason to believe, if your Honor please, that the "rumor" that your Honor had was implanted by my own firm so that you were apprised, and I think Mr. Wilson is prepared to make a statement as to how your Honor was apprised of the fact that I was engaged on that trial. It came from my firm.
>
> The Court: Even assuming that to be the fact, Mr. Sutter, that is no way to apprise the Court, let it be rumored you may not be available.

[Footnote continued on following page]

At this conference, the District Court was informed for the first time that Mr. Sutter was engaged in a trial which had commenced on March 8, 1976, in County Court, Nassau County, before the Honorable Alfred F. Samenga. Michael Rosen, Esq., of Saxe, Bacon & Bolan, was present and stated that his firm had been contacted by Mr. Rastelli who had requested that the firm represent him in the case pending before Judge Platt (A. 11a). Stephen Willson, Esq., an associate of Mr. Sutter, appeared for defendant Rastelli and advised the Court that Mr. Sutter had "not given this case the attention it deserves . . . the preparations have been spotty, to say the least. I do not blame Mr. Rastelli for trying to change counsel, and I hope this Court is not prepared to penalize him for what I feel is my office's neglect." [5]

Mr. Sutter: It was not rumored, Judge, somebody was told about it.

The Court: Well, I think I have stated my position pretty clearly on the subject. I do not know how I can make it clearer to you.

Mr. Bornstein: I have to stand up at this point because of what Mr. Sutter said and simply to reply that there was a point, I believe sometime prior to the 19th, that Mr. Wilson did call me. We discussed several topics, amongst which he indicated to me the possibility that Mr. Sutter was actually going to be engaged. I told him I was going to call the Court on the basis of this and I respectfully did want to mention I know I did so. Whether Mr. Wilson took this to mean he was relieved from the responsibility I do not know, but I did tell him we were going to be calling for a pretrial conference. There was a subsequent conversation I know as well, where I know with regard to a different matter I suggested Mr. Wilson call the Court directly, but I do know at this point that Mr. Wilson did tell me at least in part about this matter. I told him I would call the Court. I do not know whether he took that as relieving him of the responsibility. I simply wanted to put that on the record. (A. 115a-117a).

[5]. A. 9a-10a. Later, Mr. Wilson again stated that "we have . . . not adequately prepared for" this case (A. 13a).

The Court expressed its willingness to have counsel substituted provided the trial commenced on the firm date previously set, March 29, 1976. The Court reminded Mr. Willson and Mr. Rosen that the defense attorneys had themselves selected March 29th as the trial date and that the case had been on the calendar for a full year. Mr. Rosen requested a 30 day adjournment (A. 16a) which the Court denied, Judge Platt noting that the Government would be likely to take six weeks in presenting its case, thus affording defense counsel time for preparation.

In summary, the hearing of March 19, 1976, was the first time the trial judge was informed in open court that Mr. Sutter was not prepared to conduct Rastelli's defense, that he was, in fact, in the midst of another trial in Nassau County, that the defendant wished to discharge Mr. Sutter and retain other counsel and that the proposed substituted counsel was requesting a 30 day delay in the commencement of the trial.

II. The Proceedings of March 24, 1976.

Judge Platt called the case on March 24, 1976 to resolve several matters. One of these concerned the representation of Philip Rastelli. In this connection, the Government offered to consent to a one week adjournment, because of its concern to avoid "even the appearance that Mr. Rastelli may not have adequate representation, based on his current counsel's admission to Your Honor that he has not prepared . . ." (A. 40a).

The Court adhered to its original position, however, and expressed confidence in Mr. Sutter's competence to try the case. (A. 41a). Judge Platt again explained that he and other judges in the district had rearranged

schedules to make certain that the specific trial time requested by counsel would be reserved for this case.

> There was a date set by the parties and their counsel. The trial was set, and everybody said they would be ready. And I have moved everything around in this court, and in several other courts, to have this space available starting March 29th for this trial and I am not going to change. The judges in this court have a very busy schedule. In this case it is not fair. Just because Mr. Rastelli at this point wants to change his mind and get another counsel. I make my position abundantly clear. You can mandamus me to the Court of Appeals . . . (A. 41a).

III. Defendant's Application to the Court of Appeals for a Writ of Mandamus.

On March 26, 1976, the District Court was served with a petition for a writ of mandamus to the Court of Appeals by Saxe, Bacon & Bolan, requesting a continuance of one week (until April 5, 1976). Although in the affidavit submitted with the petition Saxe, Bacon & Bolan stated they were attorneys for Philip Rastelli, the firm had not in fact filed a Notice of Appearance (A. 150a). And as Judge Platt noted on March 29th in referring to the mandamus application, the petitioner did not apprise the Court of Appeals of the protracted history of delay and defense-initiated adjournments of the Rastelli trial (A. 65a-66a).

The Court of Appeals denied the writ on March 29, 1976, concluding that under *Stans* v. *Gagliardi*, 485 F.2d 1290 (2d Cir. 1973), it lacked power to consider the matter, whether raised on appeal from an interlocutory order or by way of petition for mandamus. At the

same time the Court requested Judge Platt "to reconsider the equities, interests and policies underlying his denial of the request for the continuance." *Rastelli* v. *Hon. Thomas C. Platt*, 534 F.2d 1011, 1012 (2d Cir. 1976).

IV. The Proceedings of March 29, 1976.

On March 29, 1976, the day set for trial, the case was called. Judge Platt acknowledged receipt of an affidavit of Mr. Sutter, dated March 26, 1976 (A. 46a-51a), in which Mr. Sutter requested an adjournment of at least four weeks (A. 51a).[6] The Court noted that Mr. Sutter had not informed the court in Nassau County, at the time he commenced the Charmont trial there on March 8, 1976, of his engagement for the Rastelli trial. Judge Platt further stated that Judge Samenga, with whom he had spoken that morning, had informed the Court that he had no knowledge of Mr. Sutter's prior engagement and could not release him except for two or three days. The affidavit of March 26th, observed the Court, was the "first application . . . from Mr. Sutter for an adjournment on the basis that he was otherwise engaged . . ." (A. 96a).

No substitution of counsel having been effected, the Court informed Mr. Willson that he would have to try the case. Mr. Willson remarked that the defendant did not wish him to try the case (A. 57a). Whereupon Judge Platt commented: "The alternative you leave me, Mr. Willson, is to fine Mr. Sutter" (A. 58a). "[I]f... you are going to refuse to try the case, the alternative

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[6] Mr. Sutter explained in his affidavit that he had been retained to defend one Gregory V. Charmont, charged with attempted murder, and that the trial in that case had commenced on March 8, 1976 (A. 46a-47a).

would be a fine of $1,000 a day on Mr. Sutter until he appears" (A. 59a). The Court expressed willingness to hear Mr. Sutter on the matter, and consented to Mr. Willson's request for an opportunity to contact Mr. Sutter.

The Court then reviewed the history of the case in order "that the record will be clear as to why the Court is taking the actions it proposes to take." (A. 61a). Judge Platt recalled that from the date of the indictment, March 5, 1975, there had been many adjournments. Only one of these was at the behest of the Government (A. 65a). When defendants selected March 29, 1976, as the trial date, the Court told counsel "to make it known to any Court where they were involved that they would be involved here at this Court and they all assured me that they would be here and ready on March 29th." (A. 63a).

When he was informed during the proceedings that the Court of Appeals had denied the writ of mandamus requested by Saxe, Bacon & Bolan, Judge Platt stated he would "impose a contingent fine of $1,000 on Mr. Sutter for his failure to appear . . ." (A. 66a). The Court offered to hear Mr. Sutter on the matter.

V. Pretrial Conference of March 30, 1976.

At a pretrial conference on March 30, 1976, Mr. Sutter, for the first time, and his partner James R. Moffatt, Esq., were present. Mr. Moffatt, representing Mr. Sutter, stated that as he read the transcript of the preceding day ". . . Your Honor has not in fact held Mr. Sutter in contempt. What Your Honor required and directed was that Mr. Sutter appear before you." The Court responded: "I did not require, I gave him the opportunity." (A. 92a).

As a preface to his explanation of why Mr. Sutter was not ready to go forward with the trial, Mr. Moffatt

averred that his partner had not committed the intentional and wilful violation of a court directive to make him liable under the criminal contempt statute.[1] The Court, without in any way affirming that it had cited Mr. Sutter for contempt (and in fact it had not), reminded Mr. Moffatt that Mr. Sutter had at no time informed Judge Samenga of his prior commitment in the Eastern District or informed the District Court of his unavailability for March 29th. "Indeed it came as a complete surprise to Judge Samenga when I called him and mentioned this problem to him yesterday morning [March 29th]," Judge Platt commented (A. 96a). Judge Platt continued:

> The first application I have from Mr. Sutter for an adjournment on the basis he was otherwise engaged came in Friday afternoon after a full jury panel had been impaneled here and I had repeatedly told counsel, including Mr. Wilson, we were going ahead on March 29th.
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> To make matters even worse I do not suppose I would have even heard about the fact that he was on trial in another case had I not on my own motion some ten days before demanded all counsel appear here because I heard rumors, rumors that there might be some difficulty in getting this case strated for trial. (*Id.*)

Mr. Moffatt related that Mr. Sutter, when commencing the criminal trial in Nassau County, believed it would take only two weeks. As of that date (March 30th), however, he anticipated the trial would continue for two or three weeks. (In fact, the trial lasted six weeks. Appellant's Brief at 12). Mr. Sutter requested a three day adjournment of the Rastelli trial so that new counsel could be substituted (A. 104a-105a).

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[1] Mr. Moffatt referred to 18 U.S.C. § 301; Judge Platt offered a correction of the citation to § 401 but in no way confirmed that Mr. Sutter was cited for contempt (A. 92a).

The Court responded that it had not heard any satisfactory reason why Mr. Sutter did not inform the Court before March 26th of his engagement in Nassau County. Judge Platt also emphasized that it was not now and had never been his intention to defy the Court of Appeals (A. 105a). Thereupon the Court offered Mr. Lang of Saxe, Bacon & Bolan the opportunity to proceed on April 5 if he could not proceed on Thursday, April 1. Mr. Lang agreed to select a jury and open on April 1 (A. 109a).

Judge Platt then reviewed a "rough draft" of his opinion. It stated that the Court had tentatively imposed a fine of $1,000 a day on Mr. Sutter for his failure to commence trial on March 29, but the Court decreased the sum to $500 for each day of delay. In the final Memorandum and Order of March 30, 1976, Judge Platt stated that a fine of $1,000 a day had tentatively been imposed on John J. Sutter, Esq. and that Mr. Sutter had received a hearing before any permanent sanction was determined. The Court then imposed costs of $500 for each day of delay from March 29 to March 31 caused by Mr. Sutter's conduct (A. 145a-152a).

ARGUMENT

The District Court properly imposed costs of $500 a day on appellant for his inexcusable failure to honor his long-standing commitment to commence the Rastelli trial on March 29, 1976.

Appellant's argument, in the main, is that Judge Platt held him in criminal contempt without cause and without complying with the procedural requirements of F.R. Crim. P. 42(b). We disagree. In the first place, Judge Platt never cited Mr. Sutter for contempt. On the contrary, the basis for the District Court's order imposing costs on counsel was the inherent power of the

Court, as reflected in the rules of the Eastern District, to assure the fair and effective administration of justice and to supervise the conduct of the legal profession. Furthermore, and most importantly, Judge Platt's imposition of costs on appellant was fully justified by appellant's own conduct.[8]

I

Rule 8 of the Individual Assignment and Calendar Rules of the United States District Court for the Eastern District of New York provides, in pertinent part, as follows:

> Rule 8—Sanctions:
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> (a) *Dismissal or default.* Failure of counsel for any party . . . to be prepared to proceed to trial at the time set, may be considered an abandonment of the case or failure to prosecute or defend diligently, and an appropriate order may be entered against the defending party either with respect to a specific issue or on the entire case.
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> (b) *Imposition of costs on attorneys.* If . . . a judge finds that the sanctions in subdivision (a) are either inadequate or unjust to the parties, he may assess reasonable costs directly against counsel whose action has obstructed the effective

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[8] Significantly, Mr. Sutter's associates, speaking on his behalf, did not consistently comprehend the proceedings as a criminal contempt. Mr. Wilson referred to a "contempt situation" on March 29, 1976 (A. 85a), but Mr. Moffatt, appearing before Judge Platt the next day, expressed the opinion that ". . . Your Honor has not in fact held Mr. Sutter in contempt." (A. 92a). Later on, in arguing that Mr. Sutter had not wilfully or intentionally defied a mandate of the Court, Mr. Moffatt referred erroneously to T. 18, U.S.C. § 301. Judge Platt merely corrected the citation—"401 I believe is the section." (A. 92a). He did not confirm in any manner that he was citing Mr. Sutter for criminal contempt.

> administration of the court's business. (at 138.6).[9]

In this case, there can be no doubt that Judge Platt was acting under the authority of Rule 8(b). As indicated above, the Court at no time stated that it was holding appellant Sutter in contempt. Instead, Judge Platt said in his Memorandum and Order of March 30, 1976, that he was imposing costs because "Mr. Sutter's conduct . . . has caused a complete disruption of this Court's calendar, has caused the unnecessary adjournment of other cases both before the undersigned and other Judges, has inconvenienced the co-defendants and their counsel and has required the unnecessary conventions of a jury panel." (A151a-152a). By thus stating the effect of appellant's conduct, Judge Platt made it crystal clear that he was imposing costs because appellant's actions had "obstructed the effective administration of the court's business," as contemplated in Rule 8(b). As we will demonstrate below, moreover, the Court's actions were entirely proper. Indeed, in imposing sanctions upon Mr. Sutter, Judge Platt was acting in accordance with his responsibility for the management of the court's business and the efficient administration of justice.

Standards of conduct for members of the legal profession apply to both judges and attorneys. The Canons of Judicial Ethics state that:

> A judge . . . may well endeavor to hold counsel to a proper appreciation of their duties to the public interest, to their own clients, and to the

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[9] Compare T. 28, U.S.C., § 1927, pursuant to which an attorney can be held personally responsible for excessive court costs incurred as a result of his own unreasonable behavior. *See also, Motion Picture Patents Co.* v. *Steiner et al*, 201 F.63, 65-66 (2d Cir. 1912), and *Gullo* v. *Hirst*, 332 F.2d 178 (4th Cir. 1964).

> adverse party and his counsel, so as to enforce due diligence in the dispatch of business before the Court.[10]
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> Courts exist to promote justice, and thus to serve the public interest. Their administration should be speedy and careful. Every judge should at all times be alert in his rulings and in the conduct of the business of the Court . . . to make it useful to litigants and to the community.[11]

The American Bar Association Standards for Criminal Justice provide that:

> § 1.2(a) Defense counsel should avoid unnecessary delay in the disposition of cases . . .
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> * * * * *
>
> (d) A lawyer should not accept more employment than he can discharge within the spirit of the constitutional mandate for speedy trial and the limits of his capacity to give each client effective representation. It is unprofessional conduct to accept employment for the purpose of delaying trial.[12]

More specifically, the respective responsibilities of judge and counsel in the instant case are articulated in the rules of the United States District Court for the Eastern District of New York.

The judge is charged with managing his calendar so that his efforts result in the "effective administration

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[10] American Bar Ass'n, The Canons of Judicial Ethics, Canon 18.

[11] *Id.*, Canon 2. *Compare* American Bar Ass'n, Code of Professional Responsibility, EC 7-38, 7-39 (1970).

[12] American Bar Ass'n, Project on Standards for Criminal Justice, *The Defense Function*, § 1.2—Delays; punctuality (1974).

of justice." [13] Obviously, this entails directives to counsel in secheduling cases for trial.[14] The Court's duty to assure the prompt disposition of criminal cases is complemented by the obligations of defense counsel and prosecutor. "Neither a conflict in schedule of Assistant United States Attorneys nor a conflict in schedules of defense counsel will be ground for a continuance or delayed setting except under unusual circumstances approved by the court and called to the court's attention at the earliest practicable time." [15]

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[13] United States District Court, Eastern District of New York *Individual Assignment and Calendar Rules*:

> Rule 6(a)—Calendars: . . . Each Judge shall dispose of cases assigned to him as required by law and *effective administrative of justice.* (at 138.4) [Emphasis supplied].

[14] *Id.* Rule 7—Conference: After a case has been assigned, the judge may direct the attorneys for each party to meet with him to discuss the case informally, to entertain oral motions and, to the extent possible and desirable, to discuss settlement or to set a schedule for the case, including for discovery, pre-trial and trial. (at 138.6).

[15] United States District Courts for the Southern and Eastern District of New York, *Criminal Rules, Plan for Achieving Prompt Disposition of Criminal Cases*:

> 10—Responsibility of United States Attorney and Defense Counsel
>
> (a) The court has sole responsibility for setting and calling cases for trial. Neither a conflict in schedule of Assistant United States Attorneys nor a conflict in schedules of defense counsel will be ground for a continuance or delayed setting except under unusual circumstances approved by the court and called to the court's attention at the earliest practicable time. Each judge will schedule criminal trials at such times as may be necessary to assure prompt disposition of criminal cases. The United States Attorney will familiarize himself with scheduling procedures of each judge and will assign or reassign cases in such manner that the government will be able to announce it is ready for trial. (at 166.14).

The plain fact is that in this case appellant Sutter failed, in the District Court, to meet his professional responsibilities. On January 5, 1976, after numerous adjournments requested by the defense, the lawyers selected March 29, 1976, as a firm trial date. Thereafter, Judge Platt, in his own words, "moved everything around" in his court, "inconvenienced every other judge," specifically arranged with Judge Weinstein to "share" the time of one defense attorney, and was compelled to decline an urgent case which Chief Judge Mishler requested him to take (A 10a, 39a, 41a-44a, 100a-101a).[16] Under these circumstances, it is clear that appellant Sutter had an obligation to the Court, the Government and co-counsel to be ready for trial on March 29th. Instead of meeting this obligaiton, however, appellant became engaged in another matter in Nassau County. Moreover, he entered the Nassau County case without either notifying Judge Platt or informing Judge Sameriga of his prior commitment in the Eastern District. The imposition of costs by Judge Platt was a proper exercise of judicial responsibility in response to appellant's conduct and was well within the Court's discretion.

Furthermore, the costs imposed by Judge Platt under Rule 8(b) were clearly reasonable. If viewed as compensatory, $500 a day is but a token of payment towards the expense involved in one day's trial. Here, in addition to the judge and court personnel, a jury panel of 75 members was called on March 30th, solely for Judge Platt, and a second panel of 130 persons was called on March 31st, also solely for Judge Platt. When these obvious expenditures are supplemented by the wasted time and inconvenience caused to other attorneys and

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[16] The Court was clearly making a determined effort to see that the Rastelli case, which had already "been on the calendar for one solid year" (A. 14a), proceeded to trial without further delay.

litigants, $500 a day in costs scarcely amounts to "financial reprisal" or "retribution," as appellant contends.[17]

Totally without merit are appellant Sutter's claims that (1) the disruption in the District Court's schedule was occasioned by an unforseeable miscalculation of the duration of the Nassau trial, that (2) he properly informed Judge Platt of the conflict in his trial engagements and that (3) there was no misconduct or obstruction of justice on his part to warrant the imposition of any sanction.

To begin with, we submit that by taking on the Nassau case Mr. Sutter exceeded "the limits of his capacity to give each client effective representation." (ABA Standards, § 1.2(d), *supra*). We note that while an attorney should not be faulted for misestimating the length of a trial, such misestimates are hardly so totally unforeseeable that no thought need be given to substitution of counsel prior to the time a conflict arises, especially where, as here, a certificate of engagement has been issued. Likewise, appellant can hardly rely on the contention that he promptly and properly notified the District Court of the conflict through his associate, Mr. Willson. Quite simply, we fail to see how it could not have been clear to an attorney of Mr. Sutter's experience that it was his responsibility to communicate directly and immediately with the federal court concerning his acceptance of another major trial and to ensure the availability of adequately prepared substitute counsel. Instead, as late as March 26th, he asked the District Court for an adjournment of four weeks which would patently have produced the "long delay and large expense" that Justice

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[17] Since this was a criminal case, the sanctions available under subdivision (a) of Rule 8 were clearly inappropriate. Accordingly, they were "inadequate" within the meaning of subdivision (b) of Rule 8.

Douglas recognized as an obstruction of justice, *Nye* v. *United States*, 313 U.S. 33,52 (1941). Finally, in response to the claim that appellant's conduct did not warrant the sanctions imposed by the Court, it is enough, in order to show that Judge Platt's actions were proper, simply to point again to the dislocation, cost and inconvenience caused in the District Court by the Rastelli case. In short, the imposition of costs on appellant under Rule 8(b) was fully justified.

II

Appellant's additional arguments, based on the contention that he was improperly held in contempt by Judge Platt, are readily disposed of. As established above, this was not a contempt case. Judge Platt acted under Rule 8(b) of the Eastern District Individual Assignment and Calendar Rules. Nevertheless, even if we were to assume *arguendo*, that this was a contempt case, the result would be the same. The record clearly shows that the procedural and substantive requirements for criminal contempt were satisfied. T. 18, U.S.C. § 401; F.R. Crim. P. 42(b); *United States* v. *Meyer*, 346 F. Supp. 973, 978 (D.C. 1972).[18]

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[18] In the amicus brief of the Bar Association of Nassau County, it is urged that although Judge Platt's authority for imposing costs is rooted in Rule 8 of the Individual Assignment and Calendar Rules, *supra*, the requirements applicable to criminal contempt (T. 18 U.S.C. § 401) must be observed. This is to say that the Court may not impose sanctions under Rule 8 without a finding that counsel's conduct "was the product of wrongful intent." (Amicus Brief at 17). Such a construction would make Rule 8 supererogatory. To the contrary, we submit that Rule 8 is a distinct and independent authorization for administrative sanctions to be imposed in the sound discretion of the judge. It does not import the stigma of a contempt citation and need not be predicated on egregiously disrespectful or disruptive acts committed with a wrongful intent. Rather, as a necessary but milder form of judicial control of the court's business, Rule 8 provides for the imposition of sanctions for certain actions which prevent or impede the effective administration of "the court's business."

Regarding the procedural requirements, the Government contends that Judge Platt accorded Mr. Sutter due process of law. Mr. Sutter was advised of the charges and had "a reasonable opportunity to meet them by way of defense or explanation." *Cooke* v. *United States*, 267 U.S. 517, 537 (1925). On March 19th, Judge Platt informed Mr. Sutter's associate that Mr. Sutter or substituted counsel would have to be prepared to commence trial on the previously agreed upon date of March 29th. On March 29th, Judge Platt gave oral notice in open court that if counsel was not prepared to conduct Philip Rastelli's defense, Mr. Sutter would be fined $1,000 for each day he or substituted counsel did not appear. At the same time, Judge Platt stated his readiness to hear Mr. Sutter on the matter. At this point, the fine was contingent, the reasons for its *prospective* imposition and been repeatedly explained in open court. The record does not therefore support appellant's allegation that the Court was "predisposed to punish Mr. Sutter." (Appellant's Brief at 15).

On March 30th, Mr. Sutter was present, and he and his representative, Mr. Moffatt, were afforded the opportunity to present their explanations of the reasons Mr. Sutter was not prepared to try the Rastelli case. The seventeen pages of transcript (A. 90a-107a) of the colloquy engaged in by the Court and counsel refutes appellant's characterization that this was a "cursary [sic] hearing." (Appellant's Brief at 15).

Also without merit would be appellant's claim that there was lacking on his part the necessary intent for contempt. Intent to obstruct the administration of justice is not limited to malicious conduct or malevolent desire to disrupt the orderly procedure of a court. It can also be found where one in full knowledge of a long standing commitment to a fixed trial date recklessly

risks his availability by reliance on an estimate that a very serious criminal case will entail only two weeks trial before another court, and regards his earlier certificate of engagement as "inconsequential." (Appellant's Brief at 13).

Furthermore, this case reveals, by admission of Mr. Sutter's associate, that pretrial preparation (the necessity of which was surely apparent by January, 1976, if not before) had not received the attention of Mr. Sutter's firm. As of March 19, 1976, Mr. Willson referred to "my office's neglect" (A. 9a-10a), and in his affidavit of March 26, 1976, Mr. Sutter requested a thirty day adjournment to prepare the Rastelli trial.[19] If such time was actually requisite to preparation in a case which had been adjourned six or seven times since its commencement in March, 1975, was there not a wilful disregard of professional responsibility to the court and to the client which merited a contempt citation? Appellant Sutter knew of the scheduled date for his appearance in the Rastelli case and chose not to honor his commitment in federal court. His failure to appear was clearly by design, *Sykes* v. *United States*, 444 F.2d 928, 930 (D.C. Cir. 1971). The requirement of intent was satisfied by this "volitional act done by one who knows or should reasonably be aware that his conduct is wrongful." *United States* v. *Seale*, 461 F.2d 345, 368 (7th Cir. 1972). Appellant "deliberately or recklessly disregarded his obligation to the court" by failure to appear or provide competent counsel prepared to commence the trial on March 29, 1976. *Sykes* v. *United States*, *supra* at 930.

Cases cited by appellant and amicus curiae are distinguishable. In *Sykes*, *supra* 929, counsel relied on his memory rather than his appointment book and mis-

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[19] However, Mr. Sutter was able to prepare for the Nassau County case in four days and four nights (A. 92a).

takenly believed that he was scheduled to start a trial on Thursday, May 15, when the actual date was Thursday, May 8. The Court of Appeals reversed the contempt conviction on the ground that his failure to appear was "not by design but resulted from a lapse of memory." *Id.* at 930. Mr. Sutter, by contrast, exhibited no confusion or forgetfulness but candidly recognized that when he accepted the Charmont case he "well knew that he had a trial scheduled in the United States Disrtict Court . . . on March 29, 1976." (Appellant's Brief at 7).

In Re Williams, 509 F.2d 949 (2d Cir. 1975), involving a lay witness summarily convicted of criminal contempt, is inapposite. The Court of Appeals found ambiguity in the trial court's directions to the witness and held the absence of factual findings a serious omission under F.R. Crim. P. 42(a). That Rule regulating summary dispositions is not in issue in this case.

The same Rule was invoked in *In Re Farquhar*, 492 F.2d 561 (D.C. Cir. 1973), in which counsel was convicted of criminal contempt for appearing eight minutes late for the reconvening of a trial. He had simultaneous commitments before two courts, had *explained the conflict to both judges* but could not obtain a release from either. The appellate court reversed the conviction since the record disclosed no criminal intent on the part of counsel. In the instant case, Mr. Sutter informed neither court of the conflict in his engagements when such conflict arose and might have been reasonably resolved. In addition, Mr. Sutter proposed to arrive *one month* late in Judge Platt's court, not just eight minutes.

III

In conclusion, we submit that the actions of Judge Platt in this case were entirely proper, whether viewed in the context of Rule 8 or the requirements of criminal

contempt. The assessment of costs was fully justified by appellant's conduct and was imposed in a totally fair manner. Moreover, we would most respectfully urge this Court to reject the argument that the sanctions imposed by Judge Platt will have the effect of creating "an apprehensive atmosphere among members of the Bar." [20] On the contrary, we believe that an affirmance of Judge Platt's order will have a positive effect. Not only will it encourage attorneys to meet their professional responsibilities, but it will demonstrate that federal judges will be supported when they act to insure the efficient administration of justice in their courts.

---

[20] Amicus Brief on Behalf of the Bar Association of Nassau County, page 17.

CONCLUSION

The order of the District Court should be affirmed.

Dated: August 6, 1976

Respectfully submitted,
DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

JOSEPHINE Y. KING,
ALVIN A. SCHALL,
Assistant United States Attorneys,
*Of Counsel.**

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* The United States Attorney's Office wishes to acknowledge the assistance of Lawrence A. Dugan and Thomas C. Etter in the preparation of this brief. Mr. Dugan is a third year law student at Syracuse University College of Law. Mr. Etter is a third year law student at St. John's University School of Law.

★ U. S. Government Printing Office 1976— 614—353—231

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 9th day of August, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Sutter, Moffatt,
Yannelli & Zevin, P.C.
33 Willis Avenue
Mineola, N.Y. 11501

Joseph W. Ryan, Jr., Esq.
114 Old Country Road
Mineola, N.Y. 11501

Harrison L. Currey, Esq.
2693 Middle Country Rd.
Lake Grove, N.Y. 11755

Sworn to before me this
9th day of August, 1976

Martha Scharf

Evelyn Cohen

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1977

ORIGINAL

76-1194

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

PHILIP RASTELLI, et al.,

Defendants,

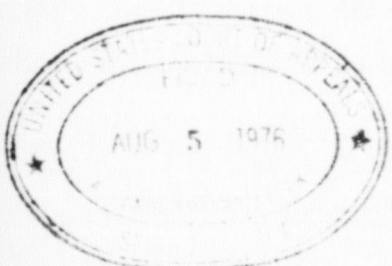
JOHN JOSEPH SUTTER, Esq.,

Defendant-Appellant.

BRIEF ON BEHALF OF *AMICUS CURIAE*, THE SUFFOLK COUNTY CRIMINAL BAR ASSOCIATION

HARRISON L. CURREY, Esq.
Attorney for The Suffolk County Criminal Bar Assoc. Amicus Curiae
2693 Middle Country Road
Lake Grove, New York 11755

(516) 588-1440



HARRISON L. CURREY
Of Counsel

249 Press of Fremont Payne, Inc., 417 Canal St., N.Y.—966—6570

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United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

PHILIP RASTELLI, et al.,

Defendants,

JOHN JOSEPH SUTTER, Esq.,

Defendant-Appellant.

BRIEF ON BEHALF OF *AMICUS CURIAE*, THE SUFFOLK COUNTY CRIMINAL BAR ASSOCIATION

Preliminary Statement

This is an appeal by John Sutter, from an order entered in the United States District Court for the Eastern District of New York on March 30, 1976, by the Honorable Thomas J. Platt, District Court Judge, imposing a fine in the sum of $500.00 per day for a total sum of $1,500.00 for the delay the appellant allegedly caused in the commencement of the above captioned trial. The fine was paid.

Questions Presented

1. Whether John Sutter's failure to appear in Federal District Court because he accepted and became engaged in a case in Nassau County that he believed would last only two weeks amounts to a criminal contempt?

2. Whether Mr. Sutter was improperly punished summarily, and should have been granted a trial or hearing first upon notice?

3. Whether Judge Platt should have disqualified himself from trying or hearing, and sitting in judgment of Counsel?

POINT I

Counsel's failure to appear on the date scheduled was not a contempt.

According to *Carbon Fuel Co.* v. *United Mineworkers of America*, 517 F.2d 1348, 1349 (4th Cir., 1975):

> ". . . criminal contempt is punitive in nature, is intended to vindicate the authority of the Court and cannot be purged by any act of the contemnor. . . . It is 'unconditional since it penalizes yesterday's defiance rather than seeking to coerce tomorrow's compliance. It cannot be ended or shortened by any act of the defendant."

A conviction for criminal contempt, like other proceedings of a criminal nature must include a finding of either general or a specific intent on the part of the contemnor to commit the offense. A finding of recklessness on the part of the attorney may sometimes furnish the inference that the requisite intent was present. Thus Mr. Sutter's acceptance of the Charmont case in the good faith belief that the trial would end in two weeks (this testimony is not controverted) would be relevant to show that Sutter lacked the intent needed to sustain his contempt conviction.

As was stated in *United States* v. *Williams*, 509 F.2d 949, 960 (2d Cir., 1975):

> "To warrant a conviction in criminal contempt, the contemnor's conduct must constitute misbehavior

> which rises to the level of an obstruction of and an imminent threat to the administration of justice, and it must be accompanied by the intention on the part of the contemnor to obstruct, disrupt or interfere with the administration of justice."

The cases researched do not disclose whether the attorney's absence or lateness is being charged under § 401 (1) or § 401 (3) but all the cases seem to require a finding of intent or recklessness. It appears, however, that the cases found deal with absence or lateness of an attorney as a possible violation of § 401 (1) since the language often considers whether the "misbehavior" was in the "presence of the court." The type of "disobedience" that gives rise to a § 401 (3) situation is that situation where, for example, a witness refuses in open court to answer the questions put to him on the witness stand after the court has told him he must answer. *United States* v. *Martin*, 525 F2d 703 (2d Cir. 1975) (holding that to convict under § 401 (3) there is no need to find obstruction of justice). Thus § 401 (3) does not seem to be involved in the present case. Parenthetically, it is noted that Sutter, as a private attorney, is not covered under § 401 (2). *Cammer* v. *United States*, 350 U.S. 399 (1956).

It would appear that the Second Circuit does require a finding of intent to obstruct (*United States* v. *Williams*, supra). The requirements for a conviction under § 401 (1) are fourfold: 1. The conduct must amount to misbehavior. 2. The misbehavior must amount to an obstruction of justice. 3. The conduct in question must be in the presence of the court or so near the court that it obstructs the administration of justice. 4. There must be an intent to obstruct. (*United States* v. *Seale*, 461 F.2d 345 (7th Cir. 1972).) The four *Seale* requirements appear to have support in cases decided by the Supreme Court; and, it is submitted, each *Seale* requirement must be found by proof beyond a reasonable doubt.

There appear to be no Second Circuit cases that have considered the issue of whether absence or lateness of an attorney from a courtroom amounts to a contempt. However, cases from other circuits indicate that such absence is not a contempt when the requisite intent is lacking on the part of the attorney.

In *Sykes* v. *United States*, 444 F.2d 928 (U.S. Cir. Ct. D.C. 1971), the petitioner, an attorney of record in a criminal case requested and obtained a continuance of the trial until May 8, 1969. The attorney failed to appear on May 8 and the trial court found him in contempt. It appeared that the attorney had simply forgotten about the May 8 appearance; although he had noted the date in his notebook, he chose to rely on his memory. It was not until 2 PM on May 8 that the attorney stopped at his office and learned of the May 8 date. He had been under the erroneous impression that the trial dates continuance was May 15, as both dates had been discussed. The attorney had not previously been late or absent from court on the days he was scheduled to appear.

The Court of Appeals stated that, "An essential element of that offense (criminal contempt) is an intent, either specific or general to commit it." (444 F.2d at 930.) By definition, a contempt is a *wilful* disregard or disobedience of a public authority." (emphasis by the court.) The *Sykes* court also said that the requisite intent to support a criminal contempt conviction can be inferred if "a lawyer's conduct discloses a reckless disregard for his professional duty," (444 F.2d at 930) and the court further stated:

> "On the contrary, it is clear from his unchallenged explanation that his failure to appear was not by design but resulted from a lapse of memory, preoccupation with another case and confusion as to dates. There were no unusual circumstances justifying a conclusion that his conduct was reckless." (444 F.2d at 930.)

In a later case, *In Niblack*, 476 F.2d 430 (U.S. Ct. of Appeals D. C. 1973), an attorney's contempt conviction was affirmed when the attorney appeared for a scheduled hearing an hour and fifty minutes late. The *Niblack* case is distinguishable from *Sykes*, however, because in *Niblack* the attorney was habitually late to court and had been repeatedly warned about his lateness.

In *In re Farquhar*, 492 F.2d 561 (U. S. Ct. of Appeals D. C. 1973), the attorney returned eight minutes late from a recess. The attorney was late because he was in another part in the same courthouse attending a bond hearing. The trial court found the attorney in contempt. The attorney explained his conduct by saying that the judge's clerk in Case 2 told him not to leave as his case was first on the calendar. As the attorney was about to return to Case 1, his hearing was called. After the judge in the bond hearing case was informed that the attorney was actually engaged in trial, the judge told him to stay as his hearing could be called first. His hearing was called, lasted ten minutes, and the attorney immediately returned to the trial part.

Again the Court of Appeals reversed the trial judge since the attorney's conduct simply did not rise to the level of recklessness needed for contempt. The *Farquhar* court stated at 492 F.2d at 564:

> "Though the appellant (Farquhar) is not blameless for the creation of this conflict and might have judiciously foreseen the possibility for an impasse, his conduct was not 'contumacious', *Gates*, 478 F2d 998; or in 'reckless and wilful disregard of the court's order', *Niblack*, 476 F.2d 930; nor did it disclose '(a reckless) disregard for his professional duty or that he intended any disrespect for the court' *Sykes*, 444 F.2d at 930."

In *United States* v. *Delahanty*, 488 F.2d 396 (6th Cir. 1973) the Court of Appeals found that the facts did not

support a finding of intent necessary to sustain a criminal contempt. Delahanty and Tucker, two attorneys from out of town were to appear in the Louisville Federal District Court at 10:00 A.M. Tucker had no intention of appearing in the Louisville court as he had "other matters scheduled" and Tucker designated Delahanty to act for him. Due to Delahanty's unfamiliarity with Louisville he arrived at 10:10 A.M. At 10 A.M. the Court rescheduled the case for 1:00 P.M. and fined each attorney $150.00. The Court of Appeals said that the appellants' conduct did not display either a reckless disregard of professional duty or evince disrespect for the Court.

Additionally, the *Delahanty* case is similar to the present case in that the trial courts in both cases dealt with the matter of the attorneys' absence summarily. In *Delahanty*, the trial judge fined the appellants at 10:00 A.M. and *then* held a hearing at 1:00 P.M. saying, "Judge Tucker, I will let you put whatever you want to in the record. Gentleman, the contempt fine is going to stay." (488 F.2d at 399.) The Court of Appeals noted that while the absence was obvious to the trial court, the reasons for the absence were not obvious and therefore summary treatment by the court was not warranted. Similarly, Judge Platt imposed a summary fine of $1,000.00 a day on Mr. Sutter even before hearing what Mr. Sutter had to say (March 29 transcript page 59a).

POINT II

Counsel should have been granted a hearing or trial upon notice and not summarily convicted and fined.

Under Rule 42a, the only contempt that may be punished summarily are those occurring in the actual presence of the court. All others must be prosecuted upon notice and hearing under Rule 42b.

The first problem is whether Judge Platt had in fact punished Mr. Sutter summarily. Judge Platt on March 29 immediately fined Mr. Sutter $1,000.00 a day without Mr. Sutter being present. After hearing Mr. Sutter in court, the fine was reduced to $500.00 per day. It would appear that even Mr. Moffat, Mr. Sutter's partner and attorney, on March 30th, did not believe Mr. Sutter had been held in contempt on March 29th and requested a hearing on March 30th. (March 30 transcript, page 92a). However, it appears from a reading of the March 29th transcript that Mr. Sutter was actually being fined summarily $1,000.00 a day and that he would not be able to do much to change Judge Platt's mind (March 29, page 43a). Even Mr. Moffat got this impression initially following the events of March 29. (March 30 transcript, page 92a).

It is possible that Judge Platt could have cured the summary contempt conviction by the March 30th appearance of Mr. Sutter. (*In re Allis*, 531 F.2d 1391 (9th Cir. 1976).) However, Judge Platt never at any time, on March 29th or March 30th, withdrew the original $1,000.00 a day fine during the time he permitted Mr. Sutter to speak. In *United States* v. *Marshall*, 423 F.2d 1130 (5th Cir. 1970), the District court had imposed a summary fine but later withdrew it and held a hearing before imposing a new fine. Mr. Sutter, however, did not appear on March 30th for an impartial hearing, but in effect appeared in mitigation of sentence.

In re United Corporation, 166 F Supp. 343 (D. Del., 1958), noted that the notice should clearly state the underlying facts of the contempt. Rule 42B adds further requirements, such as describing the acts as a criminal contempt; giving notice in open court in the defendant's presence, or via show cause order on order of arrest. What Judge Platt did was to give the underlying facts on March 29th, impose a "contingent" $1,000.00 fine for "failure to appear in accordance with the mandate of this Court." (record, page 66a.)

In no way did Judge Platt comply with 42B. The closest he came to calling Sutter's actions contemptuous was the reference to "failure to appear, etc." No show cause or arrest order was issued. Instead, Mr. Sutter was extended the chance to explain himself, after imposition (albeit "contingent") of a fine.

POINT III

The presiding judge should have disqualified himself.

It is obvious from a reading of the transcripts that Judge Platt was very upset by the failure of the Rastelli trial to proceed on March 29. As an example of this, the March 30, 1976 transcript (e.g., pages 16a, 19a, 20a, 87a) is replete with references by Judge Platt to his trial calendar and his preoccupation with the Rastelli case as being one of his longest cases on the calendar. However, no federal cases have been found which require a judge, upset because his calendar is rearranged by an attorney's failure to appear, should, for that reason, disqualify himself from adjudging the attorney's contempt.

Taylor v. *Hayes*, 418 U. S. 88, 95 S. Ct. 2697 (1974) indicates that when marked personal feelings are present on the part of lawyer and judge, the judge should disqualify himself. In *Taylor*, the attack was made on the person of the judge. In the present case however, Mr. Sutter was not physically in the courtroom; he made no personal attacks upon Judge Platt. In *Taylor*, the Supreme Court said that the attorney was entitled to a finding of contempt by a dispassionate judge. The *Taylor* opinion makes clear that the critical factor in determining if the judge was dispassionate to make a fair finding of contempt is the judge's responses to the lawyer's misbehavior. (95 S. Ct. at 2705 n. 10.)

However, in *State ex rel. Wendt* v. *Journey*, 492 S. W. 2d 861 (Missouri Ct. of Appeals, St. Louis District 1973),

the Missouri appellate court found that the trial judge should have disqualified himself. The attorney failed to appear at a trial scheduled to being Dec. 2, 1971. The trial court held a hearing on Dec. 2 and found that cause existed to hold him in contempt and issued a show cause order returnable Dec. 18, 1971. The attorney was fined $400 and given 15 days in jail. The Missouri appellate court said that the trial judge did not seem to be able to impartially decide if the attorney's absence was a disrespect to the court, and accordingly determined that his rights of due process were denied. In reaching its conclusion, the court replied on *In re Lamson*, 468 F. 2d 551 (1st Cir. 1972); and went on to say:

> "Much like intent, the judge's attitude in this respect may not be readily discernible and the judge may be an unwilling prisoner of his own preconceived notion of what is or is not disrespectful." (492 S.W. 2d at 864.)

CONCLUSION

The order of the District Court imposing a fine for contempt should be reversed and the fine remitted.

Respectfully,

HARRISON L. CURREY, Esq.
Attorney for The Suffolk County Criminal Bar Assoc. Amicus Curiae
2693 Middle Country Road
Lake Grove, New York 11755
(516) 588-1440

HARRISON L. CURREY
Of Counsel

UNITED STATES COURT OF APPEALS
For the Second Circuit

United States of America,

Plaintiff-Appellee,

against

Philip Rastelli, et al.,

Defendants,

John Joseph Sutter, Esq.,

Defendant-Appellant.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Helen D'Esposito , being duly sworn, deposes and says thatshe is over the age of 18 years, is not a party to the action, and resides at 28 Ridge Road, Albertson, New York 11507
That on July 27, 1976 , she served two copies of the Brief

on

Sutter, Moffatt, Yanelli & Zevin, P.C.
33 Willis Avenue
Mineola, New York 11501

David Traeger, Esq.
United States Attorney for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

.....Helen D'Esposito.....

Sworn to before me this
27th day of July , 1976

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932360
Qualified in Nassau County
Commission Expires March 30, 1977

76-1194

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1194

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

PHILIP ROSTELLI, *et al.*,
Defendants,

JOHN JOSEPH SUTTER, ESQ.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF THE BAR ASSOCIATION OF NASSAU COUNTY, NEW YORK, INC.

JOSEPH W. RYAN, JR., ESQ.,
Attorney for the Bar Association of Nassau County, New York, Inc. as Amicus Curiae,
114 Old Country Road,
Mineola, New York 11501,
(516) 248-6411.

FILED
AUG 5 1976

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1194

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

PHILIP ROSTELLI, *et al.*,
Defendants,

JOHN JOSEPH SUTTER, ESQ.,
Defendant-Appellant.

BRIEF ON BEHALF OF THE BAR ASSOCIATION OF NASSAU COUNTY, NEW YORK, INC.

Statement of Interest

The Bar Association of Nassau County, New York, Inc. has a membership of over 3,100 attorneys practicing primarily in Nassau County. Because the issues raised by the proceedings below resulting in the imposition of a $1,500 as "costs" upon appellant, are relevant to practitioners who not infrequently find themselves torn between conflicts of State and Federal Court schedules; and because of the desirability of avoiding the imposition of "costs" as punishment upon attorneys except in the most extraordinary situations, the Board of Directors of the Nassau County Bar Association authorized the appointment of counsel to file an *amicus curiae* brief on this appeal.*

* The government and appellant have consented to the filing of this *amicus curiae* brief.

The Association supports the position of appellant because, the record of appellant's conduct, both legally and factually, does not warrant the imposition of a $1,500 fine as "costs". The evidence is insufficient to conclude that appellant acted out of a deliberate or reckless disregard of his professional obligation to the Court, or that he had intended any disrespect for the Court. This is the element necessary for the Court to hold an attorney in contempt of Court, and should be no different for the imposition of "costs" as a sanction upon an attorney.

Question Presented

Whether a Court can impose upon an attorney financial punishment in the form of $1,500 "costs" for an alleged delay of trial, in the absence of any evidence or finding that the attorney's conduct constituted a deliberate or reckless disregard of his professional obligations to the Court, or that he had intended any disrespect for the Court?

Statutes Involved

Title 18, United States Code, Section 401, provided that "A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) misbehavior of any of its officers in their official transactions;

(3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Rules Involved

Rule 42 (b) of the Federal Rules of Criminal Procedure provides as follows:

> "(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Rule 8 of the Individual Assignment and Calendar Rules of the United States District Court for the Eastern District of New York provides:

> "(a) Dismissal or Default. Failure of counsel for any party to appear before the court at a conference, or to complete the necessary preparations, or to be prepared to proceed to trial at the time set may be considered an abandonment of the case or failure to prosecute or defend diligently, and an appropriate order may be entered against

the defaulting party either with respect to a specific issue or on the entire case.

(b) Imposition of Costs on Attorneys. If counsel fails to comply with Rules 3(f), 6(f) or 9 or a judge finds that the sanctions in subdivision (a) are either inadequate or unjust to the parties, he may assess reasonable costs directly against counsel whose action has obstructed the effective administration of the court's business."

Rule 9 of the Criminal Rules of the United States District Court for the Eastern District of New York provides:

"9. Responsibility of the United States Attorney and Defense Counsel.

(a) The court has sole responsibility for setting and calling cases for trial. Neither a conflict in schedules of Assistant United States Attorneys nor a conflict in schedules of defense counsel will be ground for a continuance or delayed setting except under unusual circumstances approved by the court and called to the court's attention at the earliest practicable time. Each judge will schedule criminal trials at such times as may be necessary to assure prompt disposition of criminal cases. The United States Attorney will familiarize himself with scheduling procedures of each judge and will assign or reassign cases in such manner that the government will be able to announce ready for trial.

Statement of the Case

This controversy arises out of the fact that appellant had been unable to commence a criminal trial (*United States* v. *Philip Rostelli, et al.*) before the Honorable Thomas C. Platt, United States District Judge for the Eastern District of New York, because he had been ac-

tually engaged in an attempted murder trial before the Nassau County Court (*People* v. *Gregory Charmont*) on March 29, 1976. Appellant's inability to commence the Rostelli trial on March 29, 1976 resulted in the imposition of $1,500 "costs" by Judge Platt. The basis for the imposition of the "costs" is contained in Judge Platt's memorandum-order which states, in pertinent part:

> ....since Mr. Sutter's conduct herein has caused a complete disruption of this Court's calendar, has caused the unnecessary adjournment of other cases both before the undersigned and other Judges, has inconvenienced the co-defendants and their counsel, and has required the unnecessary conventions of a jury panel for this case, this Court feels that it has no alternative but to impose costs for each day of delay of the trial in this case caused by such conduct. Accordingly the Court imposes on Mr. Sutter costs of $500 a day for each day of delay, i.e., Monday, Tuesday and Wednesday, March 29-31 or a total of $1,500 payable to this Court.

Although the memorandum-order does not specifically recite that the costs were imposed as punishment for contempt, the record shows that the Judge intended, and appellant understood, that a fine was to be imposed as punishment to vindicate the authority of the Court in the enforcement of a directive for the commencement of a trial (92a). To understand the circumstances under which appellant found himself actually engaged in an attempted murder trial, at a time when he was scheduled to commence the Rostelli trial, it is necessary to briefly review the proceedings which lead to this conflict between Court schedules.

Appellant was the attorney for one of the four defendants in the Rostelli case. He represented Philip Rostelli. The indictment charged the four defendants with alleged violations of 18 U.S.C. § 1951, 1961, 1962(c) and 15

U.S.C. § 1; and had been returned on March 5, 1975. The trial of the case had been adjourned several times thereafter; and on January 5, 1976, the trial was further adjourned * but ultimately set down for March 29, 1976. All counsel, including appellant, were issued Certificates of Engagement by Judge Platt for March 29, 1976.

Sometime in the latter part of February 1976, appellant was retained by Gregory Charmont, a defendant charged with attempted murder of a police officer, in a case pending before the Nassau County Court. This was an unusual situation. Charmont's family sought appellant's services, only after his retained counsel became "unavailable" for some reason not clear in the record. (46a-47a, 102a).

Judge Alfred F. Samenga, Nassau County Court Judge, ordered that the Charmont trial commence on March 8, 1976. The order was evidently brought about because the prosecution's principal witness suffered from a very serious cancerous condition making his "appearance and ability" to testify in Court exceedingly tenuous. (93a). Both the Judge and the prosecutor estimated that the Charmont trial would require no more than two weeks, particularly in view of the fact that it would be tried without a jury. Appellant made no reference whatsoever to the March 29, 1976 certificate of engagement in the Rostelli case, in view of the prosecutor's two-week estimate for the trial (115a).

The Charmont trial was commenced on March 8, 1976. As the trial progressed, however, it soon became apparent that the expectations of the Court and prosecutor would not be realized, and that appellant would find himself unable to commence the Rostelli trial on March 29, 1976.

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* The District Judge attributed this adjournment solely to the request of appellant (147a). The record shows, however, that the Government, on January 2, 1976, had requested an adjournment until March 1st because its key witness was recovering from surgery (65a).

Appellant did not ignore his professional obligations. Through his associate, Stephen Willson, Esq., appellant notified the federal prosecutor handling the Rostelli case of the approaching conflict for March 29, 1976. This occurred sometime before March 19, 1976. The prosecutor assured Mr. Willson that he would notify the Court of appellant's problem, which he promptly did. (105a-106a, 116a-117a). Appellant also advised his client, the defendant Philip Rostelli, of the approaching problem, and Rostelli began consulting the law firm of Saxe, Bacon & Bolan P.C. to undertake his defense at trial (103a).

Judge Platt, upon learning of appellant's approaching conflict, called a pre-trial conference.* On March 19, 1976 counsel for all defendants appeared. Stephen Willson appeared for appellant; and Michael Rosen appeared for the Saxe, Bacon & Bolan law firm. Both Willson and Rosen requested that Judge Platt permit the Saxe firm to be substituted for appellant. Rosen, however, requested a 30-day adjournment of the trial date to allow for preparation. (90-16a).

Judge Platt refused to grant the substitution of counsel unless the Saxe firm agreed to commence the trial on March 29, 1976 (18a):

> The Court: I am not going to make any changes. Every other case in this court at the moment has been inconvenienced as far as I understand by this case. It is going ahead. I have relayed to all of the judges that this was a date requested by the defendants, and it was a date firmly fixed several months ago, and I have moved my calendar around, and moved all sorts of other litigants around. If you don't believe that is so,

---

* This was apparently the result of a communication from the prosecutor who stated that he had assured Mr. Willson that he would notify the Court of appellant's problem (116a-117a).

> you can ask any of the other people that have appeared in the last few weeks. All have been told that the time for March 29th has been reserved for this case because of this gentleman. This is the date you picked. I am not going to set the world aside for Mr. Rastelli or anybody else. That ends that.

A second pre-trial conference was held on March 24, 1976, apparently at the request of the Government. Roy Cohn, Esq. appeared for the Saxe firm. The prosecutor informed Judge Platt that the Government had given further consideration to the application of Philip Rostelli for an adjournment and substitution of counsel. The Government joined in an application for a one-week adjournment of the trial date. The Government's application was based upon the fact that the anticipated six-week trial was to be substantially shortened by one-third, as a result of a severance of co-defendant Louis Rostelli; and for the further reason that there appeared to be some question concerning the adequacy of appellant's preparation for the trial. (39a-40a)

The Government's application was summarily rejected by Judge Platt (40a-42a):

> The Court: The government has no say in this matter. The court is not going to grant any adjournment. Mr. Philip Rastelli has had in my book one of the best law firms in Suffolk County. Mr. Sutter is a well-known, and as I understand it, a very competent attorney. I don't for one minute for one minute believe that Mr. Sutter is not capable of trying this case. Mr. Philip Rostelli, at this point of the game, wishes to substitute counsel, and he does so. If counsel wishes to undertake a representation of this case after its present posture for a year and a couple of months, they

> do so at this count. There is no danger that I see in this. There was a date set by the parties and their counsel. The trial was set, and everybody said they would be ready. And I have moved everything around in this court, and in several other courts, to have this space available starting March 29th for this trial and I am not going to change. The judges in this court have a very busy schedule. In this case it is not fair. Just because Mr. Rostelli at this point wants to change his mind and get another counsel. I make my position abundantly clear. You can mandamus me to the Court of Appeals, and if they say under these circumstances that I must grant a week's adjournment, then it is on their bounds to foul up my calendar, and every other calendar in this court for the rest of the Spring, and if they want to interfere with the District Court's calendar, God bless them.

Mr. Cohn sought to persuade the Judge that the requested adjournment was a reasonable one, particularly in view of the substantial shortening of the trial time and the willingness of his firm to undertake the trial. Judge Platt, however, refused this joint request (42a-43a):

> The answer is no, and I direct you to order this record and to take it to the Court of Appeals if they mandamus me.

At the close of the proceedings Mr. Cohn expressed his dismay at the Judge's intrasigent position, in the face of efforts by counsel for both the Government and the defense, to resolve the Court's problem (45a):

> We would all solve this by a one week adjournment in which a new counsel could come in without being delayed. If this rents a seam in your Honor's

plans, I am afraid we have all tried so hard to do something that is going to solve the problem.

The Court: I said all I am going to say.

Mr. Cohn: Thank you, Your Honor.

A petition for mandamus was immediately prepared and filed March 26, 1976 by the Saxe firm for a stay of the March 29, 1976 trial date in order to allow for a one-week adjournment for trial preparation.

On Friday, March 26, 1976, appellant prepared and filed with Judge Platt, an affidavit explaining the circumstances under which he had been retained in the Charmont case, and requested that the Rostelli trial be adjourned for four weeks (46a). The Judge read the affidavit and telephoned Judge Samenga, who advised Judge Platt that appellant had not made the Court aware of his March 29 engagement. Judge Samenga told Judge Platt that had appellant advised the Court of the March 29 trial date, it would have been "honored". But Judge Samenga would not release appellant from the Charmont trial to try the Rostelli case. When asked what had been the original estimate for the length of the Charmont trial, Judge Samenga confirmed that it had been expected to last two-weeks (56a-57a, 71a, 115a).

On Monday, March 29, 1976 the Rostelli case was called before Judge Platt. Mr. Willson appeared for appellant; and John Lang, Esq. appeared for the Saxe law firm. After chastizing Mr. Lang for filing the mandamus petition without having obtained a formal substitution as counsel for Philip Rostelli, Judge Platt addressed himself to appellant's problem. The Judge disclosed his conversation with Judge Samenga, and advised Mr. Willson that appellant's March 26 application for

an adjournment would not be granted. The Judge then advised Mr. Willson that (57a):

> In fairness, you are going to have to try the case . . . I say I think you are going to have to try the case.

This brought an immediate protest from both Mr. Willson, and the defendant Philip Rostelli, who stated: "I didn't retain Mr. Willson". Judge Platt countered: "You retained a firm".

The Judge then sought to force Mr. Willson to trial under threat of fining appellant (57a-58a).

> The only alternative you leave me, Mr. Willson, is to fine Mr. Sutter . . . If you want to fine Mr. Sutter as a result of his (conduct), I will. The other alternative is for you to go to trial.

Judge Platt granted a short recess to allow Mr. Willson an opportunity to contact appellant concerning the Judge's threatened action. Following the recess, Mr. Willson reported that attempts to contact appellant, who was on trial, were unsuccessful. Judge Platt's attitude remained the same: "I am here. He can come in at any time. As far as I can see, I assume you are just going to refuse to go ahead." (61a).

The Judge made one further attempt to force Mr. Willson to trial. The Judge reviewed the notice of appearance to ascertain whether it had been filed in the firm's name, or appellant's name. The notice, however, was not filed by appellant in his firm's name. (61a).

The Judge continued the proceeding by attacking counsel concerning the mandamus petition. The Judge viewed the facts recited on the petition as "completely at variance" with the history of the case, and "that's the reason why this Court wants to go to trial today". (61a-65a).

At this point in the proceedings, Judge Platt learned that the Court of Appeals had denied the mandamus petition, but had nonetheless suggested that the Judge reconsider the application for an adjournment. Judge Platt's reaction was evidenced by his immediate accusation levelled against the Saxe firm which had filed the mandamus petition. The Judge accused the firm of having misrepresented facts to the Court of Appeals, and pointed to one statement contained in the petition. Judge Platt called the statement "misleading" and "'wholly reprehensible" (65a-66a).

With respect to an adjournment of the trial date, Judge Platt announced (66a):

> As far as I am concerned, the case is ready, and as far as I am concerned, Mr. Sutter is. If his firm is not prepared to try it, he is going to have to pay the consequences. I can't force Mr. Willson on trial, unfortunately, because he pointed out he did not file a firm notice of appearance. But all I can do is fine Mr. Sutter. So I will impose a contingent fine of $1,000 on Mr. Sutter for his failure to appear in accordance with the mandate of this Court.
>
> I will give him an opportunity to address this Court and be heard on the subject, and I will call the case on a day-by-day basis with all other attorneys being deemed engaged until Mr. Sutter is free.

Because the commencement of the trial still remained uncertain, counsel for both the Government and co-defendants sought to persuade the Judge to fix a realistic trial date. Counsel for the Saxe firm suggested that jury selection commence three days later on Thursday with opening statements, and that testimony begin on the following Monday. But Judge Platt rejected this suggestion out of hand, and directed that counsel await of appellant's appearance before the Court (73a). Counsel from the Saxe firm requested that he, too, be notified of appellant's

appearance. This request was met by the following remarks of Judge Platt (86a):

> THE COURT: I don't know. I don't really want to recognize your appearance until you have filed a notice of appearance. I don't want to be charged with anything dealing with your office until you have properly appeared in this case. As I indicated to you at the start of this proceeding, I think it was improper for you to do what you did. To go to the Court of Appeals not as attorneys in this case and make an application. Counsel, you are pressing your luck pretty far. I don't feel that I can do anything with respect to you, because frankly, I don't recognize your existence here in this case.
>
> If I had been sitting on the Court of Appeals and you had pulled something like this on me, I think you know what I would have done with you based on what I said. I don't know how to make it clearer to you. I don't think it is proper for an attorney who is not retained to make an application of the type that you made and not tell the Court of Appeals that you are not an attorney of record.

The following morning, March 30, 1976 appellant appeared before Judge Platt, with the permission of Judge Samenga. Appellant was accompanied by his law partner, James Moffatt, who requested an opportunity "to hopefully demonstrate to this Court most respectfully that Mr. Sutter did not intentionally or wilfully violate a directive or mandate of this Court of any provision of Section (4)01 Title 18, United States Code". There followed a lengthy colloquy, between the Judge, appellant and Mr. Moffatt. (90a-94a).

A review of this colloquy shows that Judge Platt viewed appellant's failure to call the certificate of engage-

ment to Judge Samenga's attention on March 8, 1976 as the paramount cause of the delay in commencing the Rostelli trial. The Judge stated that his failure to do so was inexcusable. Appellant, and his partner, explained that since both Judge Samenga and the prosecutor estimated the non-jury trial would last no more than two weeks, it was appellant's judgment that there was no necessity to discuss the certificate of engagement. (95a)

Appellant respectfully and sincerely apologized to Judge Platt for the inconvenience caused by the conflicting engagements. Appellants stated in no uncertain terms that (104a-105a):

> I never intended to affront this Court. I never intended to shirk my responsibility. It is an unfortunate situation and I accept the responsibility and I ask your Honor at this point to adjourn this particular case until Thursday when new counsel will come in. They are here and they are prepared to be substituted and Mr. Rostelli desires that substitution, Mr. Philip Rostelli.

After appellant concluded his explanation, and apologies, Judge Platt remained on the bench and began to read his decisions from a rough draft already prepared before the proceedings had begun. The Judge imposed a "fine" of $1,500 upon appellant, calculated at $500 for each day delay of the trial. Later, the Courts final memorandum-order was changed to read that the Court had imposed "costs" of $1,500 upon appellant.

Appellant returned to Judge Samenga's Court in Nassau County that afternoon to continue the Charmont trial, and later paid the $1,500 fine. The Rostelli trial began on Thursday, April 1, 1976, and was concluded on April 23, 1976. Philip Rostelli was represented by the Saxe firm throughout the trial. The jury found Rostelli guilty on all counts contained in the indictment.

ARGUMENT

It is respectfully submitted that before an attorney may be subjected to the sanction of financial punishment as "costs" for an alleged delay of trial, the Court must find that the attorney's conduct constituted a "willful" disregard or disobedience of the Court's directive. The Court must find that the attorney deliberately or recklessly disregarded his obligation to the Court, or that he had intended any disrespect for the Court. This is the standard that must be met for an attorney to be found guilty of contempt of Court, and should be no different for the imposition of "costs". See: *Sykes* v. *United States*, 444 F.2d 928 (D.C. Cir. 1971).

In the appellant's case the record shows that the District Judge was unable to make such a finding in light of the undisputed fact that the Nassau County trial had not been expected to conflict with the Federal engagement. The memorandum-order appealed from makes no finding that appellant's failure to inform the Nassau County Court of his Federal engagement was either a deliberate attempt to conceal the March 29 trial date, or a reckless disregard of his professional obligation to the Court. Such a finding could not have been made because of the fact that the Charmont trial had been estimated to last no more than two weeks by everyone involved in the non-jury case. Although the language of the District Judge's memorandum intimates that appellant's failure to reveal his certificate of engagement to the Nassau County Court Judge constituted a reckless disregard of his professional obligation, no such finding was made by the Judge and the record, we submit, would not support such a finding.

We view the Court's action below as imposing a $1,500 fine upon appellant for the disruption caused by

his error of judgment in becoming engaged in the Charmont trial without having apprised the Nassau County Court Judge of his Federal engagement. As a matter of hindsight, appellant's error can easily be established. But it is likewise true that from appellant's view such a conflict was not foreseeable in the face of the two-week estimate for the Charmont trial announced by the Judge and prosecutor.

In either event, we submit that attorneys should not suffer financial reprisal of "costs" simply because of an error of judgment which resulted in the disruption of the commencement of a trial. To those attorneys active in litigation, hardly a week goes by without the exercise of judgment as to the length or progress of a trial. Quite often estimates are wrong, or the unexpected occurs which eliminates or prolongs the duration of a trial.

Attorneys should be exceedingly careful and diligent to meet their obligation to a Court which has set a firm trial date and issued a certificate of engagement to counsel for the purpose of arming the attorney with authority to justify declining other Court engagements. But here there was ample reason for appellant to gauge that no conflict would occur on March 29 if the trial on March 8 would have concluded as expected in two weeks.

It is for these practical considerations, that we submit the standard to be met before the imposition of "costs" upon an attorney should be no less than the standard required for a "fine" to be imposed for contempt of Court. Trial Judges have traditionally sought to invoke the provision of contempt under 18 U.S.C. § 401 and Rule 42 of the Federal Rules of Criminal Procedure for the purpose of imposing sanctions upon attorneys whose conduct

is alleged to have caused disruption of the Court's business. See e.g.: *Sykes* v. *United States, supra; In Re Farguhar*, 492 F.2d 561 (D.C. Cir. 1973); *Matter of Dellinger*, 461 F.2d 389 (7th Cir. 1972); *In re Walker*, 275 App. Div. 688 (2d Dept. 1949), 86 N.Y.S. 2d 726. Before imposing the sanction of contempt under 18 U.S.C. § 401, the Court must find that the attorney, had acted out of a "willful" disregard or disobedience of the Court's authority.

Although the District Judge did not cite the authority under which the Court exercised its power of sanction, it is apparent that the Judge relied upon Rule 8 of the Individual Assignment and Calendar Rules for the Eastern District of New York. We read Rule 8 as we read the contempt statute, 18 U.S.C. § 401. Both are designed to impose punishment for conduct considered detrimental to the administration of the Court's business. Rule 8 is entitled "Sanctions" and authorizes the imposition of "reasonable costs directly against counsel whose action has obstructed the effective administration of the court's business". The same essential elements appear in Rule 8 as in 18 U.S.C. § 401 (1, 3).

We can see no justification for a Court to punish an attorney for conduct considered detrimental to the administration of the Court's business without a finding that it was the product of wrongful intent by the attorney. To hold otherwise would mean that an attorney can be disciplined by financial reprisal for conduct attributable to mistake, inadvertance or error of judgment. This ominous result is wholly undesirable to the administration of the Court's business. It creates an apprehensive atmosphere among members of the Bar that can only deter experienced and able trial lawyers from accepting engagements in the Federal Courts. Trial schedules are subject

to a variety of circumstances which can place a lawyer in a conflict situation without much difficulty. We hold no brief for the lawyer who deliberately or recklessly disregards his professional obligation to the Court. But we perceive the honest, conscientious practitioner suffering financial reprisal under Rule 8 simply because of a mistake or error of judgment. We seek to prevent such action under Rule 8.

The effective administration of the Court's business requires the cooperation of Federal Judges, State Judges and members of the Bar. Here the record shows a sincere effort on the part of both defense counsel and the Government to avoid a major disruption of the Court's trial calendar caused by appellant's conduct. Appellant contributed to this effort by his notification to the prosecution attorneys and the Court of the impending conflict of engagements, albeit from an attempt to extricate himself out of his own difficulty.

The record also reveals a conscientious but angry District Judge who became personally offended and embroiled over the apparent delay caused by appellant's acceptance of the Nassau County engagement without revealing his Federal certificate of engagement. However justified, the District Judge's reaction did not serve to counter the apparent delay. It is evident from the record that the District Judge was primarily intent on punishing respondent rather than rectifying the situation for trial. The Judge rejected all attempts to accomplish formal substitution of counsel for appellant, as well as reasonable requests for a one week adjournment that was acceptable to the Government. The Judge even challengd counsel to seek a writ of mandamus from the Court of Appeals.* The success of the mandamus proceeding only made the District Judge angrier. Quite obviously, these

reactions undermined the Judge's ability to render purely objective judgment.

Under all of the foregoing circumstances, we respectfully submit that the record did not warrant the imposition of $1,500 as "costs" for appellant's conduct, nor does the interest of the effective administration of justice served by financial reprisals against an attorney without any evidence or finding that the attorney's conduct is the product of a deliberate or reckless disregard of his obligation to the Court, or that he had intended any disrespect for the Court.

CONCLUSION

The order imposing "costs" should be reversed.

Respectfully Submitted,

July 14, 1976

JOSEPH W. RYAN, JR., ESQ.,
Attorney for the Bar Association of Nassau County, New York, Inc. as Amicus Curiae,
114 Old Country Road,
Mineola, New York 11501,
(516) 248-6411.

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* As the Judge recognized in his memorandum decision, the Court's challenge only diverted counsel from the opportunity to promptly prepare for the trial (151a).

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-1194

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

PHILIP ROSTELLI, etal

Defendants

JOHN JOSEPH SUTTER

Defendant-Appellant

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 14th day of July, 1976, deponent served the within Brief of Amicus Curiae, Nassau County Bar Association upon John J. Sutter, 33 Willis Ave, Mineola, N.Y. 11501

James A. Miner, 370 E. Old Country Road, Mineola, N.Y. 11501

U.S. Attorney, Eastern District of New York, 225 Cadman Plaza, Brooklyn, N.Y. 11201

Attorney(s) for the Appellee ~~Appellant~~ in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 14th day of July 1976

Shirley Amaker

SHIRLEY AMAKER
Notary Public, State of New York
No. 24 - 4502766
Qualified in Kings County
Commission Expires March 30, 1977

SHIRLEY AMAKER
Notary Public, State of New York
No. 24 - 4502766

ORIGINAL

76-1194

B P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PHILIP ROSTELLI, *et al.*,
Defendants,

JOHN JOSEPH SUTTER, Esq.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

SUTTER, MOFFATT, YANNELLI
& ZEVIN, P.C.
Attorneys for Defendant-Appellant,
John Joseph Sutter
33 Willis Avenue
Mineola, New York 11501
516—747-5800

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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75CR 160

[redacted]

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: WEINTRAUB
vs.	DESTEFANO- Jacob Evser.
PHILIP RASTELLI, a/k/a "Rusty", "The Old Man"	186 Joralemon Street
LOUIS RASTELLI, ANTHONY DE STEFANO a/k/a	B'klyn, N.Y. TR5-0903
"Tony", "Deisty", CARL GARY PETROLE,	PETROLE- Ernest J. Peace
WORKMEN'S MOBILE LUNCH ASSOCIATION, INC.	114 Old Country Road Mineol
	N.Y. (516) 294-9200
	For Defendant: LOUIS RASTELLI
	Gustave H. Newman- 522
	5th Avenue N.Y. 682-4066
	PHILIP RASTELLI- John J. Sut
	33 Willis Avenue Mineola N
EXTORTION	(516) 747-5800

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,		3-7-75	Louis Rastelli (Potter Attorney)	5-	
Clerk,		4-4-75	Paid to Clerk		5-
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

DATE	PROCEEDINGS
3/5/75	Before PLATT,J.- Indictment filed and ordered sealed by the Court
	Bench warrants ordered
3/6/75	Bench warrant issued
3/6/75	Before PLATT,J.- Case called- Defts produced on Court on bench warrant-
	Indictment ordered unsealed- Each deft arraigneddand enter pleas of not
	guilty- bail set at $50,000.00 P.R. Bond for deft Louis Rastelli, Bail
	set at $50,000.00 surety bond for Philip Rastelli
3/6/75	Bench warrants retd and filed- executed (LOUIS and PHILIP RASTELLI)
/11/75	Magistrates Proceedings received from District of New Jersey and filed
	Appearance bond placed in vault (PETROLE)
/14/75	Before PLATT,J.- Case called- Defts and counsel present- Deft Petrole
	and counsel present- deft arraigned and enters a plea of not guilty-Bail
	set at $25,000.00 P.R. Bond secured - Limits extended to include N.J.

Docket Entries.

75CR 160

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
	Deft DeStefano's arraignment adjd without date- Case adjd to 4/18/75 for pre trid conference- bail limits extended to include S.D.N.Y. for deft Philip Rastelli		
3-18-75	Notice of Readiness for Trial filed.		
3-21-75	Before PLATT, J - case called - deft P.Rastelli & counsel John J.Sutter present - case adjd to 4-4-75 at 2:00 PM. Certificate of Engagement issued to John Joseph Sutter,Esq		
4/4/75	Before PLATT,J.- Case called- Adjd to 4/18/75 at 2:00 P.M.		
4-18-75	Before PLATT, J - case called - defts & counsels present - adjd to May 9, 1975 for status report.		
5-9-75	Before PLATT, J - case called - defts & counsels present - deft DE STEFANO arraigned and after being advised of his rights and on his own behalf enters a plea of not guilty - bail set at $25,000 P.R.B. secured. Adjd to 9-5-75 to set a date for trial - bail contd as to each deft - adjd to May 23, 1975 at 2:00 PM.		
5/23/75	Before PLATT, J.- Case called Deft and counsel present-Hearing ordered and begun-Hearing held and concluded		
9-5-75	Before PLATT, J - case called - deft PHILIP RASTELLI & attys present - adjd to Nov. 7, 1975 for status report)		
11/7/75	Before PLATT,J.- Case called- defts and counsel present- case adjd to 11/1 at 9;30 A.M.		
11-10-75	Before Platt, J - adjd to Nov. 14, 1975		
11-10-75	Petition for Writ of Habeas Corpus Ad Prosequendum filed(Rastelli)		
11-10-75	Writ Issued		
11-14-75	Before PLATT, J - case called - deft & counsel Mr.Wilson present - adjd to Jan. 5, 1976 for trial.(PHILIP RASTELLI)		
11/18/75	Writ retd and filed- executed (P. RASTELLI)		
12-8-75	Letter filed dated Dec. 2, 1975 from Gustave Newman counsel for Corp.deft. Rastelli, waiving rights to a speedy trial, etc. (WORKMEN's MOBILE LUNCH ASSN., Corp. defendant. (received from Chambers)		
12/24/75	Notice of motion for severance filed(LOUIS RASTELLI)		
12/29/75	Notice of motion for hearing to determine physical capacity to stand tria filed ret. 1/5/76 (PHILIP RASTELLI)		
1/2/76	By PLATT,J.- Order filed that U.S. Marshal deliver deft Philip Rastelli for purpose of physical examination,etc.		
1/5/76	Before PLATT,J.- Case called- deft and counsel present- case adjd to 3/29/ at 9;30 A.M. (PHILIP RASTELLI)		

Docket Entries.

75 CR--160
CRIMINAL DOCKET

DATE	PROCEEDINGS
1-5-76	Order returned and filed - executed (deft Rastelli)
3-19-76	Before Platt, J - case called - deft & counsel present - adjd to 4-29-76 for trial.
3-24-76	Stenographers transcript dated 3-19-76 filed.
3/25/76	Before PLATT,J.- Case called- defts and counsel present- Deft Philip Rastelli's motion for extention of time for trial- motion denied submi order
3/19/76 3/25/76	By PLATT,J.- Order filed that deft P. Rastelli be examined Certified copy of order for physical exam for deft Philip Rastelli retd and filed- executed
3-29-76	Before PLATT, J - case called - defts & attys present - trial ~~ordered and begun~~ for - court finesJ J. Sutter, attorney for deft Philip Rastelli $1000 a day for failure to appear - such fine to run daily contingent upon his appearance in court - all other attorneys are deemed engaged on trial - deft Louis Rastelli motion for severance - granted on consent - ~~trial~~ contd to 3-30-76 at 9:30am
3-30-76	Stenographer's transcripts dtd March 24 & 29, 1976 filed.
3-30-76	Before PLATT, J - case called for trial - defts & attys present - Atty J.J.Sutter motion to set aside imposition of $1,000 fine to be imposed daily for Atty Sutter failure to appear for trial - motion denied but fine is modified to the extent that Atty Sutter is fined $500 a day from 3-29-76, 3-30-76, 3-31-76 making a total of $1500 in fines. Atty Sutter is relieved as Atty as of 4-1-76 when substitution of counsel will be effected for deft Philip Rastelli. Deft Corp.Workmen's Mobile Lunch Assoc. motion to sever - granted on consent. adjd to 4-1-76 for trial.
~~3-30-76~~	~~By PLATT, J - Order of dismissal filed (WORKMENS MOBILE LUNCH ASSN)~~
3-30-76	By PLATT, J - Memorandum and Order filed imposing on Mr. Sutter, Counsel for deftPhilip Rastelli, costs of $500 a day for each day of delay, i.e., Monday, Tuesday and Wednesday, March 29-31* or a total of $1500 payable to this Court.
4-1-76	Before PLATT, J - case called - defts & attys present - adjd to 4-5-76 for trial
4-5-76	Before PLATT, J - case called - defts & attys present - trial ordered & BEGUN - Jurors selected and sworn - Trial contd to 4-6-76.
4-6-76	Before PLATT, J - case called - trial resumed - trial contd to 4-7-76

D. C. 109

Docket Entries.

DATE	PROCEEDINGS
4-7-76	Before PLATT, J - case called - trial resumed - Trial contd to 4-8-76
4-8-76	Notice of Appeal filed. (atty. Sutter)
4-8-76	Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals.
4-8-76	Before PLATT, J - case called - trial resumed - trial contd to 4-12-76.
4-12-76	Before PLATT, J - case called - trial resumed - deft De Stefano motion for a mistrial - motion denied -Trial contd to 4-13-76.
4-13-76	Before PLATT, J -case called - trial resumed - deft/PHILIP RASTELLIs motion to dismiss -decision reserved - Deft De Stefano motion to dismiss and for a judgment of acquittal - denied -resevered cts. 5-7; deft Petrolo motion to dismiss - trial contd to 4-14-76.
4/14/76	Before PLATT,J - Case called- defts and counsel present- trial resumed defts motions previously made denied- deft Philip Rastelli rests- trial contd to 4/15/76
4-15-76	Before PLATT, J - case called - trial resumed - trial contd to 4-19-76
4-19-76	Before PLATT, J - case called - trial resumed - trial contd to 4-20-76
4-20-76	Before PLATT, J - case called - trial resumed - Govts motion to dismiss count 3 granted on consent. each deft renews all motions previously made - motions denied - Trial contd to 4-21-76.
4/21/76	Before PLATT,J.- Case called- defts and counsel present- trial resumed jury retires to deliberate- order of sustenance signed- trial contd to 4/22/76
4/21/76	By PLATT,J.- Orders(4) of sustenance and order of lodging filed
4/22/76	Before PLATT,J.- Case called- defts and counsel present- jury resumes deliberations- order of sustenance signed - trial contd to 4/23/76
4/22/76	By PLATT,J.- Orders of sustenance(4) and Lodging(1) filed
4-23-76	Before PLATT, J - case called - trial resumed - Jury resumes deliberations Jury returns with a verdict of guilty on counts 1, 2, 5 & 7 as to defts P. RASTELLI & PETROLE; not guilty on count 4 as to deft PHILIP RASTELLI; guilty as to counts 1, 2, 4, 5 & 7 as to deft DE STEFANO. sentences adjd without date - all motions adjd to date of sentence. bail contd for defts PETROLE & DE STEFANO - deft RASTELLI in custody - jury discharged - trial concluded.
4-23-76	10 Volumes of stenographers transcripts filed.
4/26/76	Stenographers Transcript of 4/23/76 filed

Docket Entries.

75 CR-160
CRIMINAL DOCKET

DATE	PROCEEDINGS
4-29-76	Record on Appeal certified and mailed to the C of A
4/30/76	Stenographers Transcript dated 3/30/76 filed
5-3-76	Order received from the Court of Appeals filed that the record be docketed on or before May 28, 1976
5-5-76	Acknowledgment received from the Court of Appeals for receipt of record on appeal.
5-7-76	Copy of Opinion and Order filed received from the Court of Appeals denying petition for mandamus.
5-18-76	Before PLATT, J - case called - bail application substitution of security - no opposition - motion granted - deed accepted(Petrole)

Certificate of Engagement.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs

PHILIP RASTELLI

DEFENDANT

DOCKET NO. 75CR160

CERTIFICATE OF ENGAGEMENT

THE UNDERSIGNED HEREBY CERTIFIES THAT

JOHN JOSEPH SUTTER
33 WILLIS AVE.
MINEOLA, N.Y. 11501

is required to appear in this Court in the above mentioned matter on the 29TH Day of MARCH 1976 at A.M. in Courtroom #7, 4th Floor at 225 CADMAN PLAZA EAST, Brooklyn, N.Y. 11201.

DATED: Bklyn, New York

~~August~~

JANUARY 5 1976

Thos C Platt.

UNITED STATES DISTRICT JUDGE

Minutes of Hearing, March 19, 1976.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

-against- : 75-CR-160

PHILLIP RASTELLI, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

2:00 o'clock P.M.
March 19, 1976

B e f o r e :

HONORABLE THOMAS C. PLATT, U.S.D.J.

GERALD BEATTIE
ACTING OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: CARL BRONSTEIN, ESQ.,

-and-

CHARLES WEINTRAUB, ESQ.
Assistant U.S. Attorneys

STEPHEN L. WILLSON, ESQ.
Attorney for Defendant

Also Present:

MICHAEL ROSEN, ESQ.,

-and-

GUSTAV NEWMAN, ESQ.
for Louis Pastelli

THE COURT: I called this case this afternoon because I got together with Judge Weinstein. I tracked him down in Albuquerque. Judge Weinstein --

MR. BRONSTEIN: Mr. Essaroff.

THE COURT: Mr. Essaroff knew we had this engagement on March 29th. He should have informed him. However, we can work it out so that Mr. Essaroff can start before Judge Weinstein on Wednesday. Mr. Essaroff will be released to pick a jury on March 29th, before this Court in this case and it is not going to be any impediment for this case to proceed. So, that takes care of that question.

MR. BRONSTEIN: There are two other matters that came to the Court's attention since we called for a pre-trial conference. First of all, we understand there is a plan by Mr. Phillip Rastelli to change counsel. Second of all, the other remaining matter will be the physical condition of Louis Rastelli.

THE COURT: Who is for Phillip Rastelli?

MR. WILLSON: My name is Stephen Willson.

THE COURT: Mr. Willson?

MR. WILLSON: That is correct. Our office, and Mr. Sutter, who is currently engaged in a murder trial before Judge Zamenga in County Court, Nassau County, has not given this case the attention it

deserves. I feel, perhaps, I am primarily to blame for not bringing to this Mr. Sutter's attention. Nonetheless, the preparations have been spotty, to say the least. I do not blame Mr. Rastelli for desiring to change counsel, and I hope this Court is not prepared to penalize him for what I feel is my office's neglect.

THE COURT: I will not penalize him. If he wishes to change counsel, he can. The case is going on the 29th regardless if he changes counsel.

MR. WILLSON: Further, your Honor, I would like you to consider the medical situation.

THE COURT: One step at a time. Do you understand what I am saying on this particular point? He can take anybody he wishes as new counsel, provided appropriate substitutions are executed, but he does so with the express understanding that we are going to trial on March 29th. This engagement was set several months ago, and I just indicated to Essaroff's attorney, it has inconvenienced every other judge in this court, this case. I have been asked by the Chief Judge to take another case that is under a 90-day gun, and the Chief Judge, and every other Judge is recognizing my engagement with this case on March the 29th. The Strike Force has kept Mr. Weintraub on their payroll

for this case. It is not going to be adjourned. Mr. Sutter can fulfill his obligation to his client. If he can't do it, somebody else can come in and try it. If it is not done properly, he is accountable to his client. He has known about this trial date. It is not going to be adjourned.

MR. ROSEN: We have been contacted by Mr. Rastelli several days ago to come in and represent him in this case.

THE COURT: I told you the condition.

MR. ROSEN: I know what was said. I think counsel's candor in Mr. Sutter's office compels your Honor to reconsider.

THE COURT: There is going to be no reconsideration.

MR. ROSEN: If in fact your Honor does allow our firm to represent --

THE COURT: Mr. Justice Clark of the United States Supreme Court, when I saw him a year and a half ago in Washington, when I was sent down there after I had been appointed to the bench, said to me, at that time, "Judge Platt, one of those things you are going to find when you get to Brooklyn is that every time you set a case for trial and give the attorneys a firm date, one week before the trial date you are going to get

at least one application from another attorney who is going to walk in and say I want to have a substitution and we want an adjournment as a result thereof." He said, there's only one way to deal with that problem. That is to say, you may have that substitution, but you're going to trial. I have found that to be the truth, unfortunately enough. I don't know why it is peculiar to this Court, but attorneys in this metropolitan area must realize that this is the ruling. It is a ruling that is uniform throughout both the Southern and Eastern Districts, and it is not going to be varied in this case.

MR. ROSEN: I appreciate your Honor's position. I would suggest to your Honor that in fact I have no doubt Mr. Sutter's office has --

THE COURT: If they want to confess wrong, that is their problem, but it is not my problem. It is not your problem. You don't have to take the case. They have to try the case. They took the case. They are responsible for it. You do not have to get yourself into this situation.

MR. ROSEN: I'm aware of that. Your Honor, I am trying to speak from the standpoint of Mr. Rastelli' rights.

THE COURT: There is no suffering of his

personal rights. This case was adjourned to the March 29th date at everybody's request. This was the date they picked. I didn't pick it.

MR. ROSEN: I am aware of that, Judge, but I don't believe your Honor would even permit for one second a man to go to trial whose counsel is not prepared.

THE COURT: He's got his problems with his counsel. He picked the counsel. This is not a court-assigned counsel. This is a counsel he picked.

MR. ROSEN: I am aware of that, too. I think, most respectfully, the man's liberty is at stake, and if this attorney represents to us that he has failed in his obligation, he should not be penalized.

THE COURT: They had better get to it between now and the 29th.

MR. WILLSON: YOur Honor, in view of the request, I don't understand the importance of this particular case, which is one count of the Sherman Anti-Trust Act, and several counts of the Hobbs Act, must commence on March 29th. If Mr. Rastelli does wish a change of counsel, and we have, as I stated, not adequately prepared for, if he wishes new counsel to come and --

THE COURT: I understand the importance of the case.

MR. WILLSON: I am asking most respectfully -- Judge, I don't know why it is so important that it must commence on March 29th to Mr. Rastelli's prejudice.

THE COURT: It is not to Mr. Rastelli's prejudice. This not a new case. This bears a 75 CR 160. This has been on the calendar for one solid year. Under the new rules enacted by Congress it should have been tried six months ago.

MR. WILLSON: In that regard, Judge, I would like to make it clear why Mr. Rastelli is currently incarcerated and is not on the bail that has been set and posted in this court. He's in jail on the testimony of one man, a former bail bondsman, admitted forger of the County Court judge's signature. That man's case is over four years old. In fact, it was on this morning in Riverhead. That man's trial is the reason for Mr. Rastelli's incarceration now, and while we can't get his own doctor to perform his operation. That man's indictment is over four years old. There have been over 50 adjournments. It has been adjo rned to this morning. Itappeared nowhere on the calendar except that the administrative judge's clerk told me that the folder was in the back and would be sent out back somewhere.

THE COURT: This is not Suffolk County.

MR. WILLSON: I am aware, Judge. I am trying to give the background for the problem we are facing here, and why this man can't get the surgery he needs, and why I feel somehow that there is some magic to the name that everybody that everybody wants to go after Mr. Rastelli. Maybe I'm a bit paranoid, but I know this particular man, and his testimony was allowed to convict him, and is the reason that he is in prison. He is represented by a prestigious law firm in Suffolk County. He was under a perjury and forgery indictment. No motions were ever made, and yet, this witness at the trial swore up and down, he said he made no deal for his testimony either with Mr. Nadjari --

THE COURT: What have I to do with that?

MR. WILLSON: This man is in jail on a writ brought this Court on the Washington case basis. Judgement came down to the Second Circuit.

THE COURT: We're not here to consider that.

MR. WILLSON: I think we ultimately will be when we see why he has not been able to get his surgery, and were it not for this particular thing, I think they are looking for a big name, scalp, to put on their belt in Suffolk County, and perhaps this is the situation here.

THE COURT: This is not the situation here. This

case is one of the oldest criminal cases I have got. It's not the oldest criminal case I have. It is going to be tried on March 29th.

MR. WILLSON: This is the feeling I get.

THE COURT: Do you want to look at my calendar? Look at the rest of my calendar. Walk into my chambers, ask the law clerk to look at my calendar. If this isn't one of the oldest cases I have, I will reconsider. I am sure it is.

MR. WILLSON: I would request --

THE COUPT: You are not singled out.

MR. WILLSON: I would respectfully request, absent an extreme prejudice to the Government, that your Honor reconsider and allow new counsel.

THE COURT: I understand the Government has been preparing for this case for some period of time. I am informed that, and I may be incorrectly informed, that the Government has kept Mr. Weintraub on the payroll for the purposes of trying this case. Otherwise, Mr. Weintraub has left the office. He is assigned to try this case. This Court has to try this case. We are not going to make exceptions for the reasons I have indicated to you.

MR. ROSEN: If your Honor please, we would need a reasonable time, of 30 days.

THE COURT: You can work as co-counsel if you wish. You may not impose upon the Court in this fashion.

MR. ROSEN: Perhaps the Court has overlooked the fact that Mr. Rastelli's situation --

THE COURT: The Government will take six weeks to try. If you can't get your thoughts together in six weeks to present any defense, I really don't feel too sorry for you.

Is that right, Mr. Weintraub, it would take six weeks to try?

MR. WEINTRAUB: That's correct, your Honor.

MR. ROSEN: Your Honor didn't let me finish. Mr. Rastelli has been incarcerated, as I understand it, on a State case. I physically saw, and I wish your Honor would perhaps have the stomach to see what I saw is in this man's stomach. This man has been in jail. Perhaps that's why his lawyers cannot prepare its case, and this is not some kind of late-minute merry-go-round to delay a trial. This is well founded and based on the circumstances, with no intention of a delay, per se. This man has a growth coming out of his stomach that is unreal. I don't blame him if he can't communicate too good. He is unintelligible. I have a doctor's report that states it is coming out

of the man's stomach. There are substances here, most respectfully, that would warrant my application.

THE COURT: No summations at this time.

MR. BRONSTEIN: Mr. Rosen is addressing himself to a probable reason for judgement based upon medical history. I believe we ought to reserve for the moment. I assumed we were still addressing ourselves to the change of counsel before we get into the medical.

I would like to be heard on that.

MR. WILLSON: I would request that your Honor reconsider.

THE COURT: I am not going to make any changes. Every other case in this court at the moment has been inconvenienced as far as I understand by this case. It is going ahead. I have relayed to all of the judges that this was a date requested by the defendants, and it was a date firmly fixed several months ago, and I have moved my calendar around, and moved all sorts of other litigants around. If you don't believe that is so, you can ask any of the other people that have appeared in the last few weeks. All have been told that the time for March 29th has been reserved for this case because of this gentleman. This is the date you picked. I am not going to set the world aside for Mr. Rastelli or anybody else. That ends that.

Now, let's get down the medical part of the problem.

MR. WILLSON: If your Honor please, shortly after the last time we were here, and prior to that, Mr. Peace's office has been seeking to get a leave of absence pursuant to the New York State Corrections law for Mr. Rastelli to have the operation performed by his own physician. I think, perhaps, the facilities are available at Clinton. I don't question that. I do know, however, from speaking to Dr. Smith, his physician, that Dr. Smith had received, shall we say, a hostile reaction from the practicing surgeons up in the Clinton area for his coming up and performing the surgery there. He hoped to be here today.

MR. ROSEN: The doctor is here.

MR. WILLSON: I understand Dr. Smith is here. I don't want to get into a full-fledged hearing at this point. I am sure Dr. Smith can correct me if I'm wrong, the end results of Mr. Peace's offices was well in excess of a month, and what I find to be a somewhat incredible letter from the then superintendent, and I understand that he is no longer in that position at the Clinton Correctional Facility, that (A) The facilities were there, and he didn't think he was entitled to a leave of absence, and (B) In any event,

the responsibility for his health was in the hands of those who physically had custody of him.

Once again, I don't believe that is really correct under the New York State correctional law. I believe Mr. Rastelli is denied his right as defined in that particular sentence.

THE COURT: Well, as you know, you brought up a writ of habeus corpus before me, and as I indicated, unless you can cite some authority to the contrary, I didn't think I had jurisdiction. I do not see why you are rearguing that point.

MR. WILLSON: The Warden says he doesn't have jurisdiction.

THE COURT: The Warden does have jurisdiction, and I don't see how I could have jurisdiction.

MR.WILLSON: I brought it -- the statute says either the district where he is held, or the district where the Court is in which he was convicted, which is in this district. I brought it here because I knew --

THE COURT: You might bring it in the State Court in which he was convicted. He wasn't convicted in this Court.

MR. WILLSON: The Suffolk County Court is in this district.

THE COURT: He is not being held in federal

custody. He is being held in State custody. You can go to the federal custody -- the state Court, rather, and seek to get a release to his private doctor. You can't come here. This is not the Court of Appeals, the Court of Appeals as some of the attorneys think.

MR. WILLSON: And Article 78 --

THE COURT: Or some sort of writ of habeus corpus in Suffolk County. I don't practice any longer in State Court. I can't educate you.

MR. WILLSON: Judge -- all right.

MR. BRONSTEIN: Is what is being set now an application for adjournment based on Mr. Rastelli's physical condition?

THE COURT: No. That is not it. He thinks -- I ought to release him to the custody of his physician for the purpose of an operation. I say, I have no jurisdiction to do that.

MR. WILLSON: It will be an application, but -- you are right, Judge. I am initially asking you to reconsider and exercise jurisdiction. I think you do have it. I think it is clear, given the decision of the superintendent.

THE COURT: Have you read the decision of the Supreme Court which said that in a State Court you must exercise or attempt to issue a writ of habeus corpus,

fully exhaust your state for a remedy --

MR. WILLSON: I have not read that case.

THE COURT: I think Mr. Burns can recite the name off the top of his head.

MR. WILLSON: My private library is limited. I have not gone into that.

I am changing it to a request for an attorney because of this physical condition and hope we can get his own physician to do it.

MR. BRONSTEIN: May I be heard on that, your Honor?

THE COURT: Yes.

MR. BRONSTEIN: When the matter was last on the calendar in January of this year, the Government represented that we would maintain Mr. Rastelli in the Metropolitan Correction Center for the convenience of defense counsel, and upon his request we issued this writ so he could be released to the State custody. In that, Mr. Rastelli had been at the MCC pursuant to that understanding, and in several conversations with Mr. Willson since that time, I told him, upon his request, we would release him. We were told several times that they preferred to be kept in the federal jurisdiction for, I assume, for his physical convenience or Mr. Rastelli's convenience. The situation as I

understand it is that Mr. Rastelli is not only seeking January until today -- he was supposed to have gotten the surgery taken care of. We find ourselves in a Catch-22 situation in this respect, the State has stood ready, willing and able to perform surgery on Mr. Rastelli. I was advised by Mr. Rodney Moody who is head of Corrections at the Clinton Correctional Facility, specifically, on November 17, 1975, Mr. Rastelli applied for elective surgery which was approved by the State at that time, and since that time they have been prepared to perform the surgery by a private physician in a hospital in the Plattsburg area. I assume with some sort of arrangement.

(Continued on next page.)

Hearing March 19, 1976.

MR. BRONSTEIN: (Continuing) Mr. Rastelli, however, has apparently sought to have the surgery performed by a particular private physician. To that end, I was further advised by Mr. Moody that absent any formal applications, there may be guidelines to determine whether or not a prisoner can be released for medical treatment if there is available comparable treatment by the State. So, that is the status as far as we have seen it, or as far as we have been advised by all parties. It would seem that the application for adjournment at this time would mean that it would still await, not the surgery, but approval of an application by the State to have it performed by Dr. Smith who is Mr. Rastelli's preference.

Now, beyond that I submitted to the Court and counsel today that the report of Dr. Weintraub, who examined Mr. Rastelli --

THE COURT: Dr. Weingarten.

MR. BRONSTEIN: I'm sorry. My apologies, Weingarten. I think the summary of that report, and I am not looking for a hearing at this point, was that the surgery was elected. We have scheduled, anticipating that there may be a hearing, or that the defense counsel may contest his capacity to stand trial, we have scheduled another examination for Mr. Rastelli on this

coming Tuesday, the 23rd. At this point, based on Dr. Weingarten's report of January, our understanding is that the surgery is elective; he is physically capable of standing trial. We do not believe the Government is in any way responsible for Mr. Rastelli not having obtained surgery. He certainly had adequate time to do so during the interim, though maybe not by Dr. Smith, and we oppose any adjournment on that basis.

THE COURT: I will not grant it on that basis. At this point, I would be, of course, interested to see what the examination shows on Tuesday, and if it has any questions on it, I will consider it again. At this point, I will not --

MR. BRONSTEIN: May I ask the Court's permission to have Mr. Rastelli at Dr. Weingarten's office?

MR. WILLSON: I have no objection, if your Honor would consider it also and allow Dr. Smith to be given permission to examine Mr. Rastelli at the Metropolitan Correctional Center, or any appropriate facility they may have.

MR. BRONSTEIN: The Government will not object to the application by defense, provided they draw the appropriate papers to produce a physician.

THE COURT: Can he examine him at the MCC?

MR. BRONSTEIN: Judge, I do not know what the prison regulations would be. I don't know if it can be done.

MR. WILLSON: If it can be done.

THE COURT: Let me ask this, if he is going to be produced for examination at your doctor's office, Dr. Michael Weingarten, at 9 o'clock on March 23rd, would there be any objection to Dr. Smith examining at 10 o'clock?

MR. ROSEN: That is what I was going to apply for, your Honor.

MR. BRONSTEIN: May I chat with Dr. Weingarten on this, and if that cannot be done -- my reason for the nine o'clock appointment, Mr. Rastelli would have to appear on an empty stomach for a GI series. I don't know what Dr. Smith's necessity would be, if Dr. Weingarten has any objection. We would be happy pursuant to the terms of the same order to have him produced at Dr. Smith's first.

MR. ROSEN: Dr. Smith is here, your Honor. Maybe we can make an arrangement right now.

THE COURT: Where is Dr. Smith's office?

MR. ROSEN: Doctor, where is your office?

DR. SMITH: Greenpoint.

MR. ROSEN: Want to come up?

THE COURT: He could go from Dr. Weingarten's office to Dr. Smith's office.

MR. BRONSTEIN: Would Dr. Smith have any need to have Mr. Rastelli produced on an empty stomach?

MR. SMITH: Not necessary for me because of X-ray facilities at the office.

THE COURT: You would be willing to accept Dr. Weingarten's X-rays, and whatever GI series he has?

MR. BRONSTEIN: If he does, I assume he will, if your Honor wants to endorse the order to produce him -- Judge, this is a remedial measure, if the Marshal could be instructed to take him, Mr. Rastelli, to the nurse's office, and Dr. Smith advises us he can perform his examination right now as far as Dr. Smith's examination goes.

MR. ROSEN: I would not have any objection to that type of procedure. I would like for all concerned -- I would like to speak to the doctor afterwards.

THE COURT: You are going to come into this case, Mr. Rosen?

MR. ROSEN: Judge, I want to come into this case.

THE COURT: I can't talk to you until you legally file a notice of appearance.

MR. ROSEN: Counsel can talk for me.

MR. WILLSON: If your Honor pleases, the defendant has leave of the Court to address the Court?

THE COURT: I want to settle this question first. Is there any reason why I can't ask the Marshals to have Dr. Smith examine the defendant?

MR. WILLSON: If we are permitted to speak to the Doctor.

MR. BRONSTEIN: We just provide the facility for this to take place. If there is any report, we will ask for a copy.

THE COURT: Marshal, take the defendant down and let Dr. Smith examine him.

What else?

MR. WILLSON: The defendant has asked leave of the Court to address the Court.

THE COURT: I would prefer not to at this stage.

MR. ROSEN: Tell him what you want to tell him.

MR. WILLSON: He wants to speak here.

MR. P. RASTELLI: What is this, this is nothing here (indicating).

THE COURT: You're going to be examined by doctors.

MR. P. RASTELLI: I am sick. Judge, this is no joke.

no joke.

THE COURT: I want to make a determination.

MR. P. RASTELLI: I want to go to go to trial as much as anybody else. I want to find out why I am here.

THE COURT: Any objection to him being examined by the Government's physician on March 23rd?

MR. WILLSON: Not as long as we have our examination today.

THE COURT: All right. I will sign the order. That takes care of Mr. Phillip Rastelli.

I think Mr. Newman has something to say with respect to Mr. Louis Rastelli.

MR. NEWMAN: Your Honor knows that Mr. Louis Rastelli is a paraplegic. The last time this hearing was on I indicated on the record a willingness on my behalf to have Mr. Louis Rastelli, himself, examined by any doctor the Government sees fit to select. We talked about a prospective date for that, and the date we talked around was March 1st. As a result of many mechanical problems, the ultimate examination took place last Tuesday I believe it was. Prior to that, and on the previous Thursday, I had him examined by my own doctor. When I say my own doctor, I mean a doctor which we selected. I have received an oral

report from my Doctor. I understand from the oral report that my doctor contends he is not physically or mentally able to stand trial. I have not seen a medical report from the Government's doctor. I was told this morning in words --

MR. BRONSTEIN: Can I reframe that, Mr. Newman?

MR. NEWMAN: I haven't finished, Mr. Bronstein.

I was told in words or substance by Mr. Bronstein what he says the substance of the oral report is that he received from his doctor. I am not asking your Honor to be in a vacuum to decide. This situation, if I understand Mr. Bronstein correctly -- the upshot of the report, forgetting about whether we get down to the nitty-gritty of his physical ability to stand trial, the situation that Mr. Bronstein was suggesting was an abbreviated -- at best an abbreviated trial schedule of 10 to 12 in the morning, and either two till four in the afternoon or 2:30 to 4:30 in the afternoon with certain safeguards in the sense of having a male attendant here from the VA Hospital with arranging for the VA to transport.

My doctor tells me orally of special diets, private treatment, the inconveniences involved. If Mr. Bronstein would concede that there is no question that this man is paralyzed, paralyzed for life, and

one question and maybe a threshhold again, and is really that significant to the criminal justice system that if a case is going to take six weeks, and I have something significant to add to that, if a case is going to take six weeks, the normal occupancy, is that seriously injurious to the criminal system, to have a paraplegic on trial from 10 to 12, from two to four, or 2:30 or 4:30, delay a bunch of lawyers, delay a Court, delay a jury, delay everything in order to get him tried when one thing we are agreed on, if we can agree on anything else, that he is condemned for life as a paraplegic no matter what the sentence is.

Your Honor has the power to intervene. It is not great reading. All of the separate counsel have discussed it with your Honor before . In the other light, the question your Honor -- we have a tendency to disregard the kind of sentences. No greater punishment could be given out if he is found on every count, and if it was a multiple offense. There comes time when we have to lay aside legal niceties, say we are beating a dead horse, so to speak.

I, in a moment of insanity, undertook to represent the corporation. The result, I am married to this case for eight or ten weeks whether you sever

Louis Rastelli or don't sever Louis Rastelli. So, we can plan to have a trial from 10 to 12 and again from two to four or plan from 2:30 to 4:30, and we can have 26 attendants all around Mr. Louis Rastelli, but if nature takes its course, and he responds to that course, to put it mildly, Judge, we will have a mess in this courtroom. This to me does not seem the way to try a case, and I know all about the niceties of trial defendants. I heard that subject to the new wrinkles that may be added by these two able prosecutors, and I know the need to go forward with the cases, and I know the need for everybody to have their day in court, but I say, what for.

If we are concerned about moving with the case, and you're going to take six weeks and have four trial lawyers all facing the possibility that this man's bowel movements -- it seems to me that this is all likely of being moved down the road to insanity for the reason to have this man sit here on trial, convicted, if you want, in a battered frame, to have the Government bring him before your Honor to put a sentence upon a lifetime of paralysis, and this is going to be met by, I am sure, a very intelligent statement by the Government to the effect that justice must be meted out, whatever, whether the man is innocent, or not innocent.

He should be so adjudged, and he should be in the courtroom, and this is -- I am presenting the facts to you, Judge, and I really can't understand why it is necessary to put everybody through that kind of situation.

MR. BRONSTEIN: I assume, your Honor, that Mr. Newman's impassioned plea is either one for severance, or adjournment.

THE COURT: It is for --

MR. NEWMAN: I am not asking for any adjournment.

THE COURT: He is asking for severance.

MR. BRONSTEIN: I assume he is also indicating the need for a hearing to determine the advisability of keeping Mr. Louis Rastelli in the case. Suffice it to say at this point that my indication is that nature does not take its course with Mr. Rastelli for approximately a five to six-hour period. Our physician has indicated his capability to stand trial. We are prepared to take steps that will adequately assure Mr. Rastelli's comfort and well being during the trial, while he is in court, and in the courthouse.

Another thing I gather is that Mr. Newman has conceded that there would be a hearing before any such determination would be made by the Court.

MR. NEWMAN: I haven't considered conceding anything. I have not received the information from your physician. I have not gotten to the question of testimony, if medical experts.

THE COURT: Maybe it would be wise to seek medical reports as soon as they are available, and I will determine whether we need a hearing. Then we will have a hearing, and if it is necessary, then we will determine whether he should be severed. I always like to listen to the loquaciousness of Mr. Newman. He has been here many times before. He usually doesn't do it to me. He usually does it to that box over there. He is good at it.

MR. NEWMAN: At the sake of beating a dead horse, I am wondering if this isn't a case that calls out more for common sense than legal language.

THE COURT: I understand your point, Mr. Newman. You don't have to get wound up again. I will read the reports and decide whether a hearing is necessary. If a hearing is necessary, we will have such a hearing, and then I will make a determination whether you're entitled to a severance or not.

MR. BRONSTEIN: Well, as soon as we get the report we will get it to both counsel and the Court.

THE COURT: I assume whatever happens on the

29th, they are going to make some arrangements to transport him from the VA Hospital.

MR. BRONSTEIN: Arrangements have been made with the VA Hospital to provide permanent or portable -- permanent/portable toilet facility. We had contacted GSA about whether we would be able to erect a portable facility. A male attendant will be provided by the hospital. If there are any dietary problems, as Mr. Newman is concerned, I am sure they could be worked out, or through the hospital. There have been several such problems, and we will be able to accommodate them adequately. Such comparable defendants have been tried before.

THE COURT: All right. Gentlemen, on the 29th.

MR. NEWMAN: You will possibly be seeing me before, if we submit a report.

MR. WILLSON: If I may, Judge, I would like to respond to Mr. Bronstein's statement about Mr. Rastelli being kept down. He is absolutely correct. He indicated to me that he could be admitted back to Clinton at any time. Nonetheless, Judge, we never anticipated the deliberate, and I can't think of it as anything else, the ignoring of Mr. Peace's office by the Superintendent of the Clinton facility which took well in excess of a month.

The second consideration, Judge, is that Mr. Rastelli was here in Brooklyn. His family is here in Brooklyn. He is going to have the hearing in Brooklyn. His hospital is here in Brooklyn. His pending federal case is here in Brooklyn, and the Court -- we hope it will overturn in Suffolk conviction is here in Brooklyn. We thought it was convenient, and we were hoping we could get the operation done. We were obviously wrong. We weren't trying to impede the Court, or stall, or anything else.

THE COURT: I am not disputing anything you have to tell me. You know what I have to do, given the fact as I have it.

* * *

Minutes of Hearing, March 24, 1976.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- :

PHILIP RASTELLI, et al, : 75-CR-160

Defendants. :

----------x

United States Courthouse
Brooklyn, New York

March 24, 1976
9:30 o'clock A.M.

B e f o r e :

HONORABLE THOMAS C. PLATT, U.S.D.J.

I hereby certify that the foregoing is a true and accurate transcript from my stenotype notes in this proceeding.

Official Court Reporter
U. S. District Court

PERRY AUERBACH
ACTING OFFICIAL COURT REPORTER

EXHIBIT "A"

Hearing, March 24, 1976.

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: CHARLES WEINTRAUB, ESQ.
Assistant U.S. Attorney

ROY COHN, ESQ.
Attorney for Defendant Rastelli

JACK EVSEROFF, ESQ.
Attorney for Defendant Anthony DeStefano

THE CLERK: The United States v. Philip Rastelli.

MR. WEINTRAUB: Your Honor, there are really two matters to be resolved. First, we dealt with the representation of Mr. DeStefano. Mr. Evseroff is here, and there was question as to the last pre-trial conference whether Mr. Evseroff was engaged or not. I think there are legal issues that are clear on the record.

THE COURT: I understand that he starts a case before Judge Weinstein this morning, and that Judge Weinstein will make him available to us as needed. But I also understand you have someone in your office.

MR. EVSEROFF: Mr. DeStefano knows that if I am engaged, and if Your Honor wants to start, my partner, Bill Soenshine will start the case.

THE COURT: Certainly Mr. Soenshine is a capable lawyer.

MR. EVSEROFF: Mr. DeStefano knows that, and he has consented.

THE COURT: I don't see the problem.

MR. WEINTRAUB: The government is concerned. We have this on the record for Monday morning, and will not be surprised --

THE COURT: -- I already told you that Judge Weinstein will cooperate with us; half a day here,

half a day there.

MR. EVSEROFF: judge, I must say, I 've never tried two cases at the same time, but I am always willing to learn. But listen, you can only try one at a time, and that is what I have a partner for. Might I know what date this is scheduled for?

THE COURT: Monday.

MR. WEINTRAUB: That is correct. The other problem is a representation of Mr. Philip Rastelli.

THE COURT: I thought I made my position about the appearance.

MR. WEINTRAUB: You did, Your Honor. The government has considered the situation as to Philip Rastelli. Yet, quite frankly, we are somewhat concerned about the situation. We have concluded that we had consented to the severance of Louis Rastelli. That should shorten this trial, Your Honor, by about a third. Instead of the anticipated six weeks in direct, I think it is fair to say the direct will be concluded in four weeks. Because of that, and because even the appearance that Mr. Rastelli may not have adequate representation, based on his current counsel's admission to your Honor that he has not prepared the government would consent to a one week adjournment.

THE COURT: The government has no say in this

matter. The court is not going to grant any adjournment. Mr. Philip Rastelli has had in my book one of the best law firms in Suffolk County. Mr. Sutter is a well-known, and as I understand it, a very competent attorney. I don't for one minute for one minute believe that Mr. Sutter is not capable of trying this case. Mr. Philip Rastelli, at this point of the game, wishes to substitute counsel, and he does so. If counsel wishes to undertake a representation of this case after it's present posture for a year and a couple of months, they do so at this count. There is no danger that I see in this. There was a date set by the parties and their counsel. The trial was set, and everybody said they would be ready. And I have moved everything around in this court, and in several other courts, to have this space available starting March 29th for this trial and I am not going to change. The judges in this court have a very busy schedule. In this case it is not fair. Just because Mr. Rastelli at this point wants to change his mind and get another counsel. I make my position abundantly clear. You can mandamus me to the Court of Appeals, and if they say under these circumstances that I must grant a week's adjournment, then it is on their bounds to foul up my calendar, and every other calendar in this

court for the rest of the Spring, and if they want to interfere with the District Court's calendar, God bless them.

MR. COHN: May it please the court. My name is Roy Cohn of the firm of Saxe, Bacon and Bolan. Mr. Rosen was out here the other day. As your Honor has been told, this matter came to us very recently through a friend and client of our firm. I talked to Mr. Rastelli for the first time yesterday. Mr. Rosen has talked to him on a couple of occasions. If there was the usual case for counsel juggling or something that would institute an interference with the court calendar, I can fully understand Your Honor's position, but based upon what we know, these weaknesses, lawyers have and clients have in this last minute juggling, once in a while there does come an honest situation.

THE COURT: I am not procuring anyone's honesty at this stage. In such a case where a case has been pending for over a year, just at this point he has to take the consequences.

MR. COHN: That is what I am addressing myself to. We are not talking about one year. We are talking about one week. Mr. Weinberger has told your Honor this morning that by a severance that has been granted, a third of the trial is being cut off. So the termination

date for Your Honor's conclusion will be met. In fact, it will be better than your Honor had allowed for, so there is absolutely no adverse effect on the calendar of this court or the administration of justice.

THE COURT: That is why you have no idea what you are talking about.

MR. COHN: I really don't?

THE COURT: Making a statement like that.

MR. COHN:: I am sure it is my inexperience and--

THE COURT: It certainly is. It portrays a definite inexperience. You will understand why you are so ignorant. I want to treat you with the utmost courtesy. In this kind of a case, at this juncture, I am not being mean and harsh and arbitrary and unreasonable. I am charged with the responsibility of trying I don't know how many cases in this District, and also with a backlog of civil cases, going back to 1969. Plaintiffs yelling at me that they want some relief, and I can't just return my calendar that day.

MR. COHN: Your Honor, a third of the case before you has now been eliminated, so that your completion date will be way ahead of the time.

THE COURT: If your client plead guilty tomorrow it wouldn't alleviate my situation, except by a drop

in the bucket. You don't understand what I am saying. We are two judges short in this court. We have been waiting for a year and a half for a replacement for Judge Travia who resigned in November a year and a half ago. Congress for 5 years has promised us an additional judge. That bill is still bottled up until elections in the fall of 1976. Judge Neere just collapsed from exhaustion because he couldn't keep the pace any more, and he is in St. Cumberland Hospital, and you are in here saying to me that you want to bottle up my calendar. ((The answer is no, and I direct you to order this record and to take it to the Court of Appeals if they mandamus me.))

MR. COHN: Your Honor, should your Honor enter a formal order to this as a prelude to the mandamus, a judgement on a one-week continuance consented to by the government. But, if your Honor brings this as being a crumbling of justice --

THE COURT: Go ahead.

MR. COHN : (continuing) Should we submit a formal order.

THE COURT: Go ahead.

MR. WEINTRAUB: My office has discussed this with Mr. Trager and it is under consideration whether any summary action should be recommended against

Mr. Sutter's office based on the representations made in this court.

THE COURT: Whether I should take any summary action?

MR. WEINTRAUB: Whether you should consider his office, perhaps an order to show cause for contempt or its disciplinary action based on Mr. Sutter's representation here. That is just under consideration, your Honor.

MR. COHN: Fortunately, your Honor, we have the situation where I am sure Mr. Sutter must have some excuse or reason. I hope it is a good one why the prior counsel stands up and says "We haven't just prepared this case." And I guess the fairness calls for that a defendant is not pilloried anytime, and whether there is an admission as to whether the fault lies. We would all solve this by a one week adjournment in which a new counsel could come in without being delayed. If this rents a seam in your Honor's plans, I am afraid we have all tried so hard to do something that is going to solve the problem.

THE COURT: I said all I am going to say.

MR. COHN: Thank you, Your Honor.

MR. WEINTRAUB: Thank you.

* * * *

Affidavit of John Joseph Sutter, Sworn to March 26, 1976.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA, : AFFIDAVIT

- against - : INDICTMENT #75 CR 160

PHILIP RASTELLI, :

Defendant. :
----------X

STATE OF NEW YORK)
ss.:
COUNTY OF NASSAU)

JOHN JOSEPH SUTTER, being duly sworn, deposes and says:

That I am an attorney at law duly admitted to practice in this court and am the attorney of record for the above encaptioned defendant. That the above encaptioned matter is currently scheduled for trial on Monday, March 29, 1976.

That your deponent on March 8, 1976 commenced the trial of the People of the State of New York against Gregory V. Charmont in the Nassau County Court before the Honorable Alfred F. Samenga, County Judge. That your deponent was retained a mere ten days prior thereto when previous counsel became unavailable. That the charges in that case include two counts of attempted murder of police officers which, upon conviction, could subject the defendant Charmont to a sentence of life imprisonment.

That when your deponent commenced the Charmont trial

he was neither unaware nor neglectful of the outstanding certificate of engagement issued by this court requiring your deponent to appear in this court in the above encaptioned matter on the 29th day of March, 1976. Nonetheless, your deponent was ordered to commence trial on these serious charges and did so in view of the fact that your deponent felt that the matter could be concluded well in advance of March 29th.

That such has not been the case and trial continues and your deponent will still be actually engaged on March 29th, and, upon information and belief, the source of your deponent's information and belief being the estimate of the prosecuting authority, the trial should continue for another two and one-half weeks.

That accordingly, if your deponent remains the attorney of record, it is respectfully requested that the trial of the within matter be adjourned for a four week period to enable your deponent to complete his present engagement on trial and review the preparation had on the within cause. That additionally, your deponent is informed that the defendant is seeking a substitution of counsel by the firm of Mike Rosen, Esquire, though formal substitution has not yet been had as of this date and your deponent has no objection to such substitution of counsel.

However, should your deponent remain counsel of record the following facts and circumstances are urged upon the court for its consideration.

As heretofore related to the court by your deponent's associate, Mr. Willson, my trial commitments and pressures of office business have minimized my personal preparation of the within indictment. Since last April, your deponent has been engaged in what amounts to a running battle with the District Attorney of this County regarding a so-called "anti-corruption" Grand Jury, the ligitimacy of its proceedings, and indictments of public officials resulting therefrom. Such activities have required not only numerous court appearances, but multiple evening and weekend office hours in consultation with the numerous public officials and others involved, all in addition to my regular trial and office commitments.

Mr. Willson, who has aided in our futile efforts to get this defendant the necessary medical attention he requires, has been extremely handicapped in aiding with the preparation of the within cause due to his own numerous court commitments and the fact that, since his total disability due to mononucleosis, viral hepatitis and neuropathy during January and February of 1975, he has been under his personal physician's orders to limit his working activity to as nearly a normal daily routine as is

possible (nonetheless during this period he has suffered from nine viral attacks due to his lowered resistance which required his absence from work anywhere from one to six days at a time). Additionally, the sole library (with F 2d and F. Supp.) accessible to him during the daytime hours in Nassau County is only opened during those hours court is in session and is closed on weekends. His activity has been further restricted of late due to the fact that his wife expects their first child within the next two weeks.

It is most respectfully submitted that from the foregoing facts, since the defendant has heretofore waived and is currently willing to waive his statutory speedy trial rights for such limited period as is necessary for commencement of the trial with counsel of his choice, with adequate preparation that the ends of justice and the Sixth Amendment rights of the defendant are best served by the requested adjournment, and far out weigh the interest (if any there be) of the public in a speedy trial and compulsion to immediate trial could well result in a miscarriage of justice.[1]

That additionally, the crime for which the defendant now stands convicted and incarcerated (a state conviction in

[1] Title 18, United States Code, Section 3161, (h)(8).

Suffolk County; the defendant being technically free on bail in the instant case) resulted solely from testimony of a witness who was under indictment at that time for possession of a forged instrument, falsification of business record, grand larceny and perjury. That witness' case (indictment no. 85-72, Suffolk County) was finally disposed of on March 19th after a more than four year hiatus. That witness swore at the trial and it was vouched for by the trial prosecutor that he had made no deals nor had received any promises or assuran es from the then Chief Assistant District Attorney, Mr. Nadjari, and then head of the Rackets Bureau, Mr. (now Family Court Judge) Fierro. That your deponent has recently received copies of the minutes of the disposition of that witness' case wherein he was permitted to plead to a charge of attempted grand larceny in the third degree (a misdemeanor) and was immediately sentenced to a conditional discharge. The Suffolk County Clerk's minute book shows no motions were ever made addressed to that witness' indictment despite his representation by one of the best known law firms in Suffolk County.

Accordingly, it would seem most likely that upon an immediate writ of coram nobis in the state courts the conviction

for which the defendant now stands incarcerated would be reversed.[2]

Should this be the case, it has been your deponent's experience that a free defendant is far more able to assist in his defense on a daily basis during the evening office hours in preparation for the next trial day, and that conversely the incarcerated defendant faces a severe prejudicial handicap in trial preparation, and it would seem manifest an adjournment for this reason alone would be in the best interests of justice.

WHEREFORE, for all the reasons above stated it is respectfully requested that the trial of the within matter be adjourned for a minimum period of four weeks to any date convenient to the court and prosecution.

JOHN JOSEPH SUTTER

Sworn to before me this
26th day of March, 1976.

LINDA SUE COLYER
NOTARY PUBLIC, State of New York
No. 30-4613217
Qualified in Nassau County
Commission Expires March 30, 19..77

[2] United States ex rel Washington v. Vincent, U.S. Court of Appeals, 2nd Circuit, decided November 5, 1975.

cc:

Hon. David Trager
United States Attorney for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York

Hon. Jacob Mishler
Chief Judge
United States District Court for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York

Gustave V. Newman, Esq.
522 Fifth Avenue
21st floor
New York, New York

Jacob Evseroff, Esq.
186 Joralemon Street
Brooklyn, New York

Michael Rosen, Esq.
39 East 68th Street
New York, New York

Minutes of Hearing, March 29, 1976.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

-against- 75-CR-160

PHILIP RASTELLI, LOUIS RASTELLI, ANTHONY DE STEFANO, CARL GARY PETROLE, WORKMEN'S MOBILE LUNCH ASSOCIATION, :

Defendants. :

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United States Courthouse
Brooklyn, New York

March 29, 1976
9:30 A.M.

B e f o r e :

HONORABLE THOMAS PLATT, U.S.D.J.

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

Official Court Reporter
U. S. District Court

PERRY AUERBACH
ACTING OFFICIAL COURT REPORTER

Hearing, March 29, 1976.

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: CHARLES WEINTRAUB, ESQ.
CARL C. BORNSTEIN, ESQ.
-and-
ALLAN K. SLEPPIN, ESQ.
Assistant U.S. Attorneys

J. EVSEROFF, ESQ.
Attorney for Defendant De Stefano

G. NEWMAN, ESQ.
Attorney for Defendant Louis Rastelli

E. PEACE, ESQ.
Attorney for Defendant Petrole

Also present:

JOHN LANG, ESQ.

STEPHEN L. WILSON, ESQ.

WILLIAM SONENSHINE, ESQ.

THE CLERK: United States v. Philip Rastelli, Louis Rastelli, Anthony De Stefano and Carl Gary Petrole.

MR. WEINTRAUB: Good morning, your Honor.

MR. LANG: My name is John Lang from the firm of Saxe, Bacon and Bolen. I am not sure at this point whether we represent anyone.

THE COURT: I am not so sure that you do. It didn't occur to your firm that you pointed out to the Court of Appeals that you didn't represent Mr. Rastelli when you took the mandamus pleading.

MR. LANG: I understand there has been no formal substitution. If that is the requirement, of course it hasn't been done, but yesterday, for example, I went down to see Mr. Rastelli at the Federal House of Detention, and again I don't know whether we have representation or what. I know Mr. Wilson was here from the firm of Sutter, Moffatt, Yannelli and Zevin representing Mr. Rastelli.

THE COURT: As far as I know, he still is.

MR. LANG: I am not arguing with you on that.

THE COURT: I have nothing in my files to show there was a substitution.

MR. LANG: You see --

THE COURT: What are you here for? How can you come in and talk for a formal substitution substituting yourself as counsel? I don't understand this type of practice. Maybe it has changed without my knowing it. It has always been my understanding that a person had to be formally retained and had to file a notice of appearance if you are going to appear for him and talk in court. It hasn't occurred to you that you brought a mandamus with respect to this case to the Court of Appeals, file papers in here made applications, and so forth, and you are still not substituted.

MR. LANG: You know, Judge, we are in this kind of a hiatus where there is a question of the attorney of record who is supposed to be here. Mr. Wilson is here.

MR. WILSON: Mr. Sutter is actually engaged.

THE COURT: I talked to Judge Semanka to find out whether Mr. Sutter was engaged, and I discussed with him a certificate of engagement in this court. When I got Mr. Sutter's affidavit on Friday, I was amazed that such an affidavit should be filed, and there was no reference in that affidavit that he had made application to the Court in that case that he was actually going to be engaged on another trial here, and Judge Semanka confirmed the factthat no such application had been made to him and he was totally

unaware of it. He said that had he known it, he would have honored the engagement here. Under the circumstances, I don't see that I can honor Mr. Sutter's application.

MR. WILSON: I think everybody had known that the trial would go --

THE COURT: Mr. Wilson, it makes no difference whatsoever. If Mr. Sutter is not going to fulfill his professional responsibility to the various courts in which he appears, I am certainly not going to honor his engagement.

MR. WILSON: Perhaps that is the problem.

THE COURT: If he took too much, then he has to suffer the consequences.

MR. WILSON: Judge, I don't think the 180-day ruling was designed to --

THE COURT: In fairness, you are going to have to try the case.

MR. WILSON: His defendant currently faces a maximum exposure of a lifetime imprisonment.

THE COURT: I say I think you are going to have to try the case.

MR. WILSON: The defendant does not want me to.

MR. PHILIP RASTELLI: I don't retain Mr. Wilson.

THE COURT: You retain a firm.

MR. WILSON: No, sir, your Honor. That is not correct. Mr. Rastelli's agreement --

THE COURT: The only alternative you leave me, Mr. Wilson, is to fine Mr. Sutter.

MR. WILSON: That is the alternative?

THE COURT: You speak for Mr. Sutter, as well. If you want me to fine Mr. Sutter as a result of his contact, I will. The other alternative is for you to go to trial.

MR. WILSON: Judge --

THE COURT: You are ready.

MR. WILSON: Incidentally, Judge, I have the latest doctor's report on Mr. Rastelli pursuant to his examination on the 19th, which I have provided copies to the U.S. Attorney, and to Mr. Lang's firm in regard to the physical condition. Judge, while we are on it, it is interesting to notethat I sought a writ of habeas corpus similar to the relief that I sought here in the Supreme Court in New York County, They refused to sign the writ because they said the federal courts had jurisdiction. And so that currently is in total limbo, but that is the status of that particular matter. I don't see how I can fairly try this case for Mr. Rastelli when he desires me not to try this case. When he desires Mr. Sutter as counsel, who was

understood would be his counsel upon trial.

THE COURT: Well, Mr. Wilson, if you are going to take that position and Mr. Sutter is not here, and you are going to refuse to try the case, the alternative would be a fine of $1,000 a day on Mr. Sutter until he appears.

MR. WILSON: Is that without a hearing, Judge?

THE COURT: I don't see I have any alternative. If Mr. Sutter wants to come in and be heard, fine. He is not here.

MR. WILSON: Judge, I would like an opportunity, could you call Judge Semanka to see if he would release him for a period of time?

THE COURT: I did. He said he would not.

MR. WILSON: Judge Semanka would not release him to come in here?

THE COURT: He said he would release him for a two- or three-day trial.

MR. WILSON: Just, your Honor, for discussing the fine of $1,000 a day, regarding this particular matter.

THE COURT: I didn't discuss the potential fine. I said I would have to discuss.

MR. WILSON: I would like an opportunity, then, Judge, to make contact with Mr. Sutter, if I could, and tell him of the situation in order that he may get

permission of Judge Semanka and address the Court on it.

THE COURT: You may.

MR. WILSON: Thank you.

THE COURT: Go ahead and make a telephone call, and we will call it again in a few moments.

MR. NEWMAN: My client is not here yet, Judge.

THE COURT: I thought you just had the corporation to deal with. I thought you were going to sever the case.

MR. BORNSTEIN: I heard from the hospital about ten after nine, and they said that Mr. Louis Rastelli was on the way. I don't know where he is at this point, but certainly he is not in the hospital.

MR. LANG: Your Honor, may I be excused? I just got a call from my office. It is urgent.

MR. NEWMAN: May we leave the presence of the Court, Judge?

THE COURT: Yes.

(Time noted: 10:30. Recess taken.)

MR. WILSON: I just spoke to Mr. Papa of our office, Judge. He is the businessman who will be writing the $1,000 checks, and he is going over to Judge Semanka's part and see if he can get Mr. Sutter to contact your Honor's chambers.

THE COURT: I don't think it is going to do him

any good to contact my chambers. If he wants to come in here --

MR. WILSON: Yes, sir. With regard to speaking to your Honor about getting in here to talk to you about this.

THE COURT: I am here. He can come in at any time. As far as I can see, I assume you are just going to refuse to go ahead. I want to check on the notice of appearance on your firm's stationery. If your firm appeared you may have a problem.

Apparently, John Joseph Sutter appears.

MR. WILSON: I believe the certificate of engagement was issued in the name of John Joseph Sutter.

THE COURT: Regardless of it, it looks like he has got another problem. I think, so that the record is clear, I would like to recite the facts with respect to the record in this case which are quite different from the record that was presented to the Court of Appeals in the mandamus proceeding. So that the record will be clear as to why the Court is taking the actions it proposes to take. The docket sheet shows that on March 5th a seal of indictment was filed and ordered sealed in this case on March 5 of 1975, and on March 6th, the defendant was produced on a bench warrant, all except for one of the defendants,

De Stefano, and the indictment was unsealed, and on March 14th there was another arraignment. In this case the Government filed its notice of readiness on March 18th, and on March 21st I called the case for trial and said that it would go forward in the trial on April 4th of 1975.

On April 2nd I got a telegram from Mr. Sutter's office asking for an adjournment and saying that Mr. Rastelli had just been admitted to the hospital. That was the first application for a last-minute application that was for an adjournment. That is a full year ago.

On April 18th, it was recalled again for a status report.

On May 9th it was recalled again, and Mr. De Stefano was arraigned. On May 23rd there was a hearing held. The case was set down for September 5th for a trial. On that date there was a further request by the defendant for an adjournment to November 7th with the understanding that we would go to trial the following week on November 10th. At that time a further request for an adjournment was made by the defendants for a trial date, and at that date they wanted the trial was right after the 1st of the year.

I told them I would hold my calendar open. On

December 29th, another last-minute motion was made by the defendant, Philip Rastelli, to adjourn, asking for a hearing to determine the physical capacity of Mr. Philip Rastelli to stand trial.

On January 2nd, an adjournment was requested so that additional medicals could be obtained with respect to that hearing, and I signed an order having the U.S. Marshals deliver Philip Rastelli for the purpose of the physical examination, and on that date, if my memory serves me correctly, I asked the defendant on what date they would be ready for trial. All of the defendants picked March 29th.

The Government objected strenuously to that long an adjournment. I gave the defendants an adjournment to this morning with the understanding that everybody would be ready; the medical examinations would be over at that time. Each of the counsel asked me for a certificate of readiness.

My recollection is that I gave them that. I told them to make it known to any court where they were involved that they would be involved here at this court and they all assured me that they would be here and ready onMarch 29th. Just shortly before that, my chambers began to get rumors of further applications for adjournment, so I asked counsel to appear on

March 19th, and that was the first I understood Mr. Sutter would be substituted, and that was the first I heard that another counsel wished to come in, and that was the first time I heard of a furtherrequest for adjournment.

Now, gentlemen, it was not in any sort of being arbitrary or unreasonable. I recite that history because I think it's completely at variance to what has been presented to the Court of Appeals in the Second Circuit. But those are the facts of this case, and that is the history of this case, and that is the reason why this Court wants to go to trial today.

(continued next page)

MR. WEINTRAUB: Might I supplement that? On January 2nd the Government made a motion for adjournment because a key Government witness had undergone surgery.

THE COURT: On what day?

MR. WEINTRAUB: January 2nd, and we represented to the Court that based on the recovery period, the doctors had estimated that the earliest days the Government would be prepared to go forward with that would be March 1st, and then there were conversations in front of your Honor, and a date agreeable to all was reached at March 29th.

THE COURT: I just got word that the Court of Appeals denied the writ, but requested that it be considered under the denial of the request for a continuance, and they conceded that they have no power under Stans v. Gagliardi, to grant the writ.

Gentlemen, for the reasons I have just stated, if this thing had been properly presented to the Court of Appeals, I would think some basis would be merited, but I don't see any basis for the request. I don't think that any of these were presented to the Court of Appeals. I think the record I just recited here, instead of being the facts supporting this Petitioner as follows, you say to the Court of Appeals, "The Petitioner was indicted on or about March 5, 1975.

Pursuant to the seven-count indictment, the Petitioner faces potential incarceration for the rest of his natural life. The Petitioner has retained the law firm of Sutter, Moffatt, Yannelli and Zevin, P.C. to defend him in the action. No pretrial motions were made on behalf of the petitioner, and a trial date of March 29, 1976 was set."

As if a year and a couple of months had gone by with nothing happening in this case, and I have just finished reciting what happened in this case, and if there ever was a misleading statement given to a court, and what I think was a wholly reprehensible statement. In the light of what transpired, there was.

As far as I am concerned, the case is ready, and as far as I am concerned, Mr. Sutter is. If his firm is not prepared to try it, he is going to have to pay the consequences. I can't force Mr. Wilson on trial, unfortunately, because he pointed out he did not file a firm notice of appearance. But all I can do is fine Mr. Sutter. So I will impose a contingent fine of $1,000 on Mr. Sutter for his failure to appear in accordance with the mandate of this Court.

I will give him an opportunity to address this Court and be heard on the subject, and I will call the case on a day-by-day basis with all other attorneys

being deemed engaged until Mr. Sutter is free.

MR. PEACE: Might I request I be permitted to contact the Court and be notified when I would actually be needed here? I have a practice to look after.

THE COURT: Mr. Peace, I agree. I am very sympathetic to you, but if I don't require you gentlemen to appear as if you are on trial here, the next thing I know, one of you is going to be on trial in some other case. As far as I am concerned, you are on trial here, and I am not going to let this happen again in this case. I should never have let Mr. Sutter even get out of here on January 2nd. I should have held him here from January 2nd to date.

MR. PEACE: I would not start another trial.

THE COURT: Mr. Sutter started another trial.

MR. PEACE: I am not talking about Mr. Sutter. I am talking about myself right now, and I would just request that I be contacted and be told whether I have absolutely to be here, and if he tells me to come, I will come. It is a long trip, and I am preparing now for a long trial and there are so many things that I can do to help earn my living in my own office. I have not shown this Court any discourtesy in any event.

THE COURT: I don't think you have, Mr. Peace. As long as you are fully cognizant of the fact that

you are fully engaged, if you don't appear you know what the penalty will be.

MR. PEACE: If you tell me to come, I will come.

THE COURT: I don't know when Mr. Sutter is going to appear and say, "I am ready." I have persuaded Judge Zemanka to let me know by this afternoon. You might not know until tomorrow morning, and you might hold the whole works up.

MR. PEACE: Judge, I wouldbe in constant contact with Mr. Sutter. I am not going to hold up this case, Judge; there is no way I am going to do this with the Court's consideration of permitting me of not having to come in in the morning. If you show me a courtesy, I am not going to return it with a discourtesy. I just wouldn't do such a thing.

THE COURT: Well, you can play it the way you want, but I am saying to you, if he shows and they are all ready, and you are not here, as far as I am concerned you are all engaged here.

MR. PEACE: I will be here.

THE COURT: Does anybody want to be notified when Mr. Sutter appears here to make whatever application he wishes to make to the Court?

MR. PEACE: Would the Court excuse us physically at this moment?

THE COURT: No. The next thing I think we have to consider is this medical problem. Is Mr. Wilson prepared to address himself to that or not?

MR. WILSON: Judge, I have submitted the latest report of Dr. Smith. I have not seen the latest report of Dr. Weingarten.

THE COURT: Show him that, and we still have got Mr. Newman's motion for a severance solely as to Mr. Philip Rastelli.

MR. NEWMAN: Louis Rastelli.

THE COURT: Solely as to him.

MR. NEWMAN: I can't very well claim the physical condition of the corporation. I don't have the corporate minutes, but I don't know that that is a basis for a severance, frankly.

THE COURT: Hello, Mr. Sonenshine.

MR. SONENSHINE: Good morning, your Honor. I have very little to say or contribute or detract or do anything else, only waiting for something that doesn't occur. That is my only hope. Other than that, I have no requests to make.

MR. WEINTRAUB: Your Honor, the Government is prepared upon the appearance of the Plaintiff, Louis Rastelli, in court, to consent to his severance and to move to sever the corporate defendant.

THE COURT: You are not going to try the corporation?

MR. WEINTRAUB: No, sir.

THE COURT: I don't see the basis for the severance from the corporation. Do you plan on re-trying the corporation at some other time?

Because you won't get it on that basis.

MR. WEINTRAUB: No, sir.

THE COURT: You are going to dismiss as to the corporation?

MR. WEINTRAUB: Yes, sir.

THE COURT: Have you got authority?

MR. WEINTRAUB: Not at this point, but I don't anticipate any problem with that, your Honor.

THE COURT: Well, you are not going to get two trials.

MR. WEINTRAUB: I understand that.

THE COURT: Have you got verbal authority?

MR. WEINTRAUB: No, sir, I do not.

THE COURT: Then you'd better get verbal authority before you actually make the motion to go through with the motion to sever.

MR. WEINTRAUB: Very well, your Honor, we will hold off that motion.

THE COURT: It is not that. I just don't want to

go through two trials.

MR. WEINTRAUB: I would like to raise one other thing, your Honor. We have been juggling numerous witnesses right now. Some witnesses are from out of town and are here this morning, and it is going to be very difficult to keep them here on a day-to-day basis. If your Honor is agreeable, I would like to suggest that the date Mr. Sutter appears, and again we select a jury and open and begin evidence.

THE COURT: Mr. Weintraub, I don't know what I can do on this thing. Mr. Wilson refuses to go ahead. Mr. Sutter has not appeared. Judge Zemanka, with whom I talked this morning, said he would make Mr. Sutter available for a two- or three-day trial, but he didn't think he could make him available for the lengthy trial that is given here. Given those facts, I don't see that I have anything I can do now, except wait and see.

MR. WEINTRAUB: Perhaps I didn't make myself clear, your Honor.

THE COURT: It may be two and a half to three weeks from now.

MR. WEINTRAUB: For that very reason, I would request that the Court now indicate that when we do proceed, when Mr. Sutter is here and ready and we proceed to trial, that the first day be set aside for

selection of jurors and opening statements so that we will have one day's breathing space to get out-of-town witnesses here to go on the stand the next morning.

THE COURT: I think that would be agreeable to everybody.

MR. NEWMAN: I have no problem with that.

MR. SONENSHINE: One day after he appears?

MR. LANG: That would be no problem. If I may, by the time we really get this going, we would come in the case, Judge, if we could get April 5th.

THE COURT: You may have two and a half weeks to make up your mind, for all I know.

Mr. Sutter may run up $1,000 a day. That is up to you and Sutter.

MR. WILSON: May I clarify one thing, Judge. Your Honor said Mr. Wilson refused. In all likelihood I would refuse because of my wife's condition.

THE COURT: I can't force you on, Mr. Wilson. If I could I would. I would.

MR. WILSON: And given my wife's current condition, Judge, I would probably refuse, too.

(continued next page)

MR. LANG: Judge, is there any way we can work this out where we can start on Friday, select the jury, like the Assistant United States Attorney said, and start the testimony on Monday without imposing this fine on Mr. Sutter and having us come in on Friday.

THE COURT: I can't try cases on Friday. I have motions, calendars. I have them stacked up. I don't know to what extent on Friday, but you have never been here on Friday. They are eye-openers.

MR. LANG: Well, suppose then, Judge, it was a selection of the jury on Thursday and the opening on Thursday and then go over to Monday to the testimony.

THE COURT: You would certainly cut Mr. Sutter's fine down to $3,000.

MR. LANG: I am asking for an adjournment to Thursday, Judge.

THE COURT: Not now.

MR. LANG: We would come in and know there would be --

THE COURT: You can cut Mr. Sutter's fine down to $3,000 in any event. Is there anything else? What are we going to do with the medical?

MR. WILSON: There is a conflict as to the

necessity for surgery, and I think whoever is going to be representing Mr. Rastelli would like a hearing which probably wouldn't take more than a half a day, unless your Honor feels he can decide on the basis of the written report?

THE COURT: I don't see the conflict. Maybe you can point it out to me. I read the reports of Doctor Smith and Doctor Weingard over the weekend, and they seem to be pretty much in agreement.

MR. WILSON: There is a small hiatus, your Honor,

THE COURT: Even Doctor Smith says he can't stand trial. He says it is probably not causing Mr. Rastelli's problems as far as the psychological discomfort. That is what he says.

MR. WILSON: In one portion, Judge --

THE COURT: He doesn't say he can't go to trial. It is nowhere in that statement.

MR. WILSON: Perhaps he's able to survive a trial and go through a trial, but I do think from what Doctor Smith said, the fundamental fairnesswould be such that he should get this surgical treatment before he stands trial. Efforts were certainly made in this regard, Judge.

THE COURT: Mr. Wilson, that application was

made last fall, and an adjournment was made todate, to adjourn for you to do that. If the doctor comes in and says that he is not physically able to stand trial, that is one thing.

MR. WILSON: But in light of the rather bizarre results of these efforts that have come about, I ask your Honor to consider this. Mr. Peace's office worked for nearly two months to get a response from Clinton Correctional Facility. That failure, while we have written to the Commissioner of Corrections in the administrative body, we haven't received an answer from them.

MR. PEACE: Your Honor, we represent Mr. Rastelli in the case in Suffolk County on which he is now incarcerated. So, dealing with the stated cause, we submit it was our obligation. We got into a Catch-22 situation with the federal court. We couldn't do anything.

THE COURT: If Mr. Wilson and Mr. Sutter stayed here and asked me to have him returned to Clinton, I would have done that. I don't follow you.

MR. WILSON: May I correct one thing there, Judge. Now we knowthat all we had to do was ask he be returned. As I stated, he was done here. His doctor ishere. His family is here. His hospital is

here. We thought it more practical shipping him up there, and shipping him back down, to hold him here while the request was made, which took 2 months for a response. We are trying to do the practical thing, Judge, which obviously --

THE COURT: I am not going to grant the request.

MR. WILSON: Also, Judge, when your Honor referred me to the cases regarding exhaustion of state remedies, it did fan a little spark of scholarship, and I did read Young versus Harris, and all the cases I could find in the advanced sheets, and I really don't find a holding that the Court lacks jurisdiction, but it seems the Supreme Court lacks jurisdiction, also, and I think --

THE COURT: The Supreme Court has jurisdiction. All you have to do is return in the last few months and the surgery could have been done.

MR. WILSON: That is a great case for a law exam question, but here we are dealing with a man who needed surgery who still needs surgery.

MR. BORNSTEIN: I don't think the issue is simply whether or not Mr. Rastelli was going to get the surgery or whether or not he gets surgery by his private doctor. The Catch-22 we claim he has simply

been released. The state was prepared to perform surgery. Mr. Rastelli wanted his private physician. There is no assurance that Mr. Rastelli's going to get a furlough from the state.

THE COURT: I understand there is. I don't seethe basis for it. If Doctor Smith came in here and said, "If you put this man on trial you are going to put his life in jeopardy," I would have held a hearing, but he didn't do that. That is not what his report says, and certainly not what Doctor Weingard's report says.

MR. WILSON: I am not claiming that. I am saying he should have had his surgery beforehand and that he failed to get it, I think.

THE COURT: I think either or both. I am not prepared to say which, and I'm not going to put you, or Mr. Peace or him on the spot as to whose fault it was, but it was, and being the case there is no basis.

MR. WILSON: I don't think there is any need to lay blame out, but in fairness to Mr. Rastelli, he needed surgery, and he didn't get it.

THE COURT: Now he has to wait for him to --

MR. WILSON: Your Honor may consider the fact that the state conviction is very likely to be

adjourned on the post remedy situation.

THE COURT: I have no idea what is going on in the state case.

MR. WILSON: Would your Honor accept the fact that the defendant who is free to be far more effectively defended than one who is incarcerated every day after trial.

THE COURT: Well, we will go ahead on the basis.

MR. WEINTRAUB: Your Honor, I think I would like to address myself to this argument. In the need to prepare for trial, I suspect that Mr. Rastelli's being here in the city since November of last year should have afforded more than ample opportunity to confer with counsel and prepare for trial.

MR. WILSON: Judge, preparation for trial is daily business, and in the evening I don't think even he goes home right after he finishes his day's work and watches television when he is on trial, and neither do defendants and defense counsel in that regard. I think the fact that his being incarcerated or not is significant in his effort to defend himself properly.

THE COURT: You have Mr. Louis Rastelli here.

What do you wish to do with respect to him, Mr. Weintraub?

MR. SONENSHINE: Your Honor, while we are waiting might I address myself to the problem. That is, whether I would, in any way, communicate to your chambers physically to know if I have to be here. I am only a few minutes away. It is a walking distance, and I can get here very quickly. I don't just want to find myself staying here doing nothing every morning.

THE COURT: I will leave you in the same situation as Mr. Peace. If things happen without you, that is your problem.

MR. SONENSHINE: Well, I can always be here in a few moments, however.

THE COURT: I am not going to pass upon that as to what can happen.

MR. SONENSHINE: I am aware of that. Mr. Sutter might expect all of us to be here all day long one way or the other.

THE COURT: It is up to you. If nothing happens I am certainly not going to say, "Mr. Sonenshine is not here." If something does happen, and we have to go ahead immediately, you may find yourself in trouble. I am going to call the case

every morning at 9:30 o'clock.

MR. SONENSHINE: Well, if it is a matter of just appearing here at 9:30, your Honor, then I have no problem coming here.

MR. WILSON: May I be excused. It may have a bearing.

MR. LANG: May I ask to be excused?

THE COURT: Yes.

MR. SONENSHINE: I take it the defendant has to be here because of his physical problem.

THE COURT: Do the best you can with the situation. I appreciate the dispute you fellows are in. You are suffering because of what some other people are doing, and I don't think it is proper.

MR. SONENSHINE: Are we through the day at this moment as far as my part is concerned?

THE COURT: I don't know. Do you want to stay around to see what the result of this phone call is?

MR. SONENSHINE: As long as something is happening, fine. I can't step out.

MR. BORNSTEIN: Your Honor, there has been pending a motion for severance on behalf of the defendant, Louis Rastelli. Since we last appeared on the matter, I have conferred with Doctor Schmelka, the physician who examined Mr. Louis Rastelli on

behalf of the Government. His report is physically in his office and was completed on Friday. I have not had an opportunity to pick it up. I have conferred with Doctor Schmelka. I believe the Government's position was conveyed to Mr. Newman I believe on Friday afternoon after I had conferred with Dr. Schmelka, and I believe Mr. Newman would have a statement at this point.

THE COURT: Let me ask you a question before you go further. Have you consulted with the Department of Justice?

MR. BORNSTEIN: Yes.

THE COURT: And received authorization?

MR. BORNSTEIN: I conferred with David Margolis, the attorney in charge of the Brooklyn Strike Force, and acting deputy chief for the section, as well as Mr. Weintraub, who is in charge of this case, and uniformly agreed that it would be the best interest if the Government values Mr. Rastelli, his physical condition and talked with the Veterans' Administration Hospital, and feels that the case should be severed at this point. Dr. Schmelka had advised that there is no question, it has never been disputed that Mr. Rastelli is paralyzed. It is called from the L-1 level down, referred to the a-

of the lumbar region. I understand from Mr. Schmelka that Mr. Rastelli did not claim in candor to be necessarily in pain for perhaps a two-to-four period. Dr. Schmelka's ultimate recommendation to me on the phone was that he felt anything in excess of two days per week, two 2-hour sessions per day would be physically debilitating to Mr. Rastelli's physical as well as mental condition. In view of that, that would prolong the trial at this point, and the Government will consent to the severance motion by Mr. Newman.

MR. NEWMAN: Your Honor, just one thing I wanted to add so that the record iscomplete. I have been in the case from the initial arraignment. Shortly after the initial arraignment I undertook to represent this defendant and communicated with him before the incident which took place. I would represent to this Court that the person who I communicated to were two different people. I indicated to Mr. Bornstein on a number of occasions. I think to Mr. Weintraub, too. Mainly with Mr. Bornstein.

In my communications with him I found that his mind would tend to focus on the immediate problems of pain, and the immediate body functions

which we all take for granted, but which have now been denied him, and this would seem to be his mind wandering from things I would have to focus on or to help me prepare for a defense, and I saw fit to put him on the stand to testify in this case, and a further reason which I think in the interest of justice to mandate what has already been confined.

MR. BORNSTEIN: One other fact, your Honor. During the time of the events alleged in the indictment, Mr. Rastelli was not in his present condition. The condition occurred as a result of a gunshot wound he sustained shortly after the indictment. The Government believes this is a distinguishing feature. And our position might well have been different had he been paralyzed at the time of the indictment.

We might add that the owner of a good deal of consideration on this, one of the problems being the cause of the paralysis, this being a gunshot wound rather than illness, but we feel at the time he was not paraplegic at the time the events took place and to stand trial on a 4-day a week basis which in the Government'sposition said in his words, "Pushing it."

Coupled with the Veteran's Hospital which advised he would have to physically lie down on a 4-hour basis,

in the interest of justice, your Honor, we consent to the motion for severance.

THE COURT: When did he get this gunshot wound?

MR. NEWMAN: March 16th.

THE COURT: It was after the arraignment. All right, both sides consenting, this Court will grant the motion to sever at this time with respect to Mr. Louis Rastelli.

MR.NEWMAN: Mr. Rastelli, you heard what I said, and is this your understanding too based on the discussion we discussed and based on the discussions we had on the telephone?

MR. LOUIS RASTELLI: Right.

THE COURT: It is his desire?

MR. NEWMAN: Yes.

THE COURT: The motion is granted and the case is severed as to him.

MR. WEINTRAUB: Thank you, your Honor.

MR. NEWMAN: May he be returned to the Veterans' Administration Hospital?

The defendant, Rastelli, asks if he can sit down, Judge.

THE COURT: Yes. Sure.

MR. WILSON: I spoke with Mr. Pappa, Judge,

and he spoke with Mr. Sutter who is going to be trying to contact your Honor's chambers, and the gist of it was he would like your Honor to intercede with Judge Semanka.

THE COURT: What?

MR. WILSON: To intercede with Judge Semanka. To request him at least to allowhim to come down here regarding the contempt situation, and/or substitution of counsel or even possibly, should it come about, that Mr. Sutter is to remain in the case for whatever reason, to allowhim to have a hiatus in the trial they have in Nassau County, where I believe most of the prosecution's witnesses are police officers.

THE COURT: I will wait until I hear from him.

MR. WILSON: It is a non-jury case.

THE COURT: I understand that. I talked to the judge this morning.

Mr. Sutter made a mistake by not telling Judge Semanka that he had an engagement.

MR. BORNSTEIN: Upon Mr. Sutter's appearance at the hearing, I would appreciate that the Government be alerted as to whether or not he comes in.

THE COURT: Of course. We will alert all

counsel.

MR. LANG: I would like to know about that, too.

THE COURT: I don't know. I don't really want to recognize your appearance until youhave filed a notice of appearance. I don't want to be charged with anything dealing with your office until you have properly appeared in this case. As I indicated to you at the start of this proceeding, I think it was improper for you to do what you did. To go to the Court of Appeals not as attorneys in this case and make an application. Counsel, you are pressing your luck pretty far. I don't feel that I can do anything with respect to you, because frankly, I don't recognize your existence here in this case.

If I had been sitting on the Court of Appeals and you had pulled something like this on me, I think you know what I would have done with you based on what I said. I don't knowhow to make it clearer to you. I don't think it is proper for an attorney who is not retained to make an application of the type that you made and not tell the Court of Appeals that you are not an attorney of record.

MR. LANG: Judge, I am not arguing with you about that. I said, "O.K.", the only thing I have

asked just at this last moment is when Mr. Sutter comes in can we be notified?

THE COURT: I should think that Mr. Sutter would be very happy to notify you. Iwould think at this point you are in a large part his lifesaver. I don't know how else to make it clear to you.

MR. NEWMAN: Would the Court permit Mr. Louis Rastelli's family to visit with him for a minute or two?

THE COURT: If it is all right with the marshals, yes.

MR. NEWMAN: Is it all right?

THE MARSHAL: Yes.

THE COURT: Well, I have nothing further until tomorrow morning at 9:30 unless Mr. Sutter can persuade Judge Semanka to let him come over here. I don't know whether to proceed with Mr. Woodfield's case or not.

MR. WEINTRAUB: Thank you, your Honor.

MR. SLEPPIN: Thank you, your Honor.

MR. BORNSTEIN: Thank you, your Honor.

* * * *

Pretrial Conference, March 30, 1976.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	:	
- against -	:	75 CR 160
PHILIP RASTELLI, ANTHONY DE STEFANO, CARL GARY PETROLE, WORKMEN'S MOBILE LUNCH ASSOCIATION,	:	PRETRIAL CONFERENCE
Defendants.	:	

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United States Courthouse
Brooklyn, New York

March 30, 1976
10:00 o'clock A.M.

B e f o r e :

HON. THOMAS C. PLATT, U.S.D.J.

FRANCES S. KARR
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney for the
Eastern District of New York

BY: CHARLES WEINTRAUB, ESQ.,
Asst. U. S. Attorney and
ALLAN K. SLEPPIN, ESQ.,
Asst. U. S. Attorney

CARL M. BORNSTEIN, Esq.,
Special Counsel,
Department of Justice.

For the Defendants:

WILLIAM SONENSHINE, Esq.,
Attorney for Defendant De Stefano

ERNEST PEACE, Esq.,
Attorney for Defendant Petrole

GUSTAVE NEWMAN, Esq.,
Attorney for Defendant Workmen's Mobile Lunch

MESSRS. SUTTER, MOFFATT, YANNELLI & ZEVIN
Attorneys for Defendant Rastelli

BY: JOHN J. SUTTER, Esq. and
STEPHEN L. WILLSON, Esq.,
and
JAMES MOFFATT, Esq., appearing for
John J. Sutter, Esq.

MESSRS. SAXE, BACON & BOLAN, P.C.

BY: JOHN F. LANG, Esq.

MR. WEINTRAUB: Good morning, your Honor.

THE COURT: Good morning.

I take it you have been advised by Mr. Wilson of what has transpired in the last few days.

MR. SUTTER: Yes, I have been apprised of what occurred. I also read the Law Journal this morning and I have the transcript which I have not gotten through yet.

THE COURT: Do you wish further time?

MR. SUTTER: Yes, I do. I would like to indicate, however, that Judge Samenga most graciously allowed me to come here this morning at my request, which was made yesterday during the trial. I would like to indicate Mr. Moffatt is representing me in this particular matter. He is also my law partner.

THE COURT: Why don't you take a few moments and let me know when you are ready.

(A recess was taken.)

MR. MOFFATT: May it please the Court, my name is James B. Moffatt. I am a partner of Mr. Sutter in the law firm of Sutter, Moffatt, Yannelli & Zevin. I have been associated with Mr. Sutter in the practice of law for over sixteen years.

We received a communication yesterday, your

Honor, in fact, several communications and it was our belief or feeling at that time that your Honor had held Mr. Sutter in contempt and had in fact imposed a fine of $1,000 which is to run daily until Mr. Sutter appeared in this court before your Honor.

I have read the record and I must make specific reference to your Honor to page seven.

I will read into the record where your Honor says:

"Well, Mr. Wilson, if you are going to take that position and Mr. Sutter is not here and you are going to refuse to try the case the alternative would be a fine of $1,000 a day for Mr. Sutter until he appears.

"Mr. Wilson: Is that without a hearing, Judge?

"The Court: I do not see I have any alternative but if Mr. Sutter wants to come in and be heard, fine. He is not here."

There is a further reference by the Court on page 20 of the record:

"Mr. Lang: That would be no problem. If I may, by the time we really get this going, we could come in the case, Judge, if we could get April 5th.

"The Court: You may have two and a half weeks to make up your mind, for all I know.

"Mr. Sutter may run up to $1,000 a day. That is up to you and Mr. Sutter."

As I read that, your Honor has not in fact held Mr. Sutter in contempt. What your Honor required and directed was that Mr. Sutter appear before you. I am here to represent him.

THE COURT: I did not require, I gave him the opportunity.

MR. MOFFATT: Yes, your Honor. I am here to represent him in the event that your Honor does still consider the imposition of a fine and I would respectfully request a hearing in order to hopefully demonstrate to this Court most respectfully that Mr. Sutter did not intentionally or willfully violate a directive or mandate of this Court or any provision of Section 301 Title 18 of the Code.

THE COURT: 401 I believe is the section.

MR. MOFFATT: My basis for that is as follows by way of brief summary:

Mr. Sutter became engaged in a criminal trial in Nassau County on March 8th, after three or four days' preparation. It involves two counts of attempted murder of police officers, which required the imposition of mandatory life sentence if the defendant is found guilty. The jury was waived in the anticipation

that the engagement would take no more than two weeks. Unfortunately, your Honor, it has taken longer than that.

The People of the State of New York, represented by Mr. Stephen Irace, Assistant District Attorney who is trying that case, stated in the record yesterday with reference to any recess of the pending Nassau County trial: "I can imagine no other matter that should require his presence, that should require him not to be present in this courtroom and continuing this. I have a claim of actual prejudice which I have made because of these delays having to do with a witness, Detective Craedy, who has a very serious cancer illness and whose appearance and ability to appear in court changes from day to day. Now Detective Craedy is ready to testify tomorrow," that is today, your Honor, "or Wednesday if need be, and I simply cannot sustain the type prejudice that we will have if his testimony does not go as scheduled. There are no circumstances under which the People could consent or in any way agree to a recess of this case for any reason."

Judge, I can only say that perhaps Mr. Sutter and myself in his office should have arranged the schedule somehow that would have been available to appear before your Honor and fulfill his commitment

representing one of the defendants in the matter before your Honor. However, as I say, the jury trial was waived in Nassau County and it was anticipated by both the People and by the defense and by the judge in that case that it would take no more than two weeks.

Mr. Sutter appears here before your Honor with a consent of the presiding judge of Nassau County, Mr. Justice Morrison, presiding judge of the County Court, and Judge Samenga, the judge of the County Court presently presiding at that trial.

Judge Semanga recessed that trial this morning. Mr. Sutter is supposed to be back there for trial at two o'clock this afternoon.

THE COURT: Specifically, what would you like, counsel? Would you like to present some evidence or how do you propose to handle this?

MR. SUTTER: I would be delighted to testify, your Honor.

THE COURT: Let your counsel speak for you.

MR. MOFFATT: If your Honor wishes to have a hearing I would --

THE COURT: You said at one point you would like a hearing and that is why I ask the question.

MR. MOFFATT: Your Honor, I do not know. It

was my understanding Mr. Sutter had been held in contempt, and as I say, as I read the minutes of yesterday's proceeding, your Honor did not hold Mr. Sutter in contempt if Mr. Sutter would appear before your Honor. That is my understanding of the reading of the minutes of yesterday's proceeding before your Honor. Mr. Sutter is here and, your Honor, would you like him to address the Court?

THE COURT: It is up to you. I think you ought to understand my position in this matter. Do you know that this matter was scheduled to go to trial yesterday, March 29, and this was a date picked by all counsel and particularly counsel for the defendants last January 5th, if I am not mistaken, and on that date all counsel, including Mr. Sutter, were given certificates of engagement to appear here.

I have yet to see anything that would excuse that failure to appear and failure to be ready.

MR. MOFFATT: Judge, I understand that and I can only repeat, it is part of the record of the Nassau County proceedings at in-chambers conference with the Judge that we did not expect this engagement to last this long.

THE COURT: Mr. Moffatt, it was not in the discussion with Judge Samenga. If Judge Samenga's

statements to me are correct, there was not even any discussion of this engagement with him at the outset or any other time during the course of that trial. Indeed it came as a complete surprise to Judge Samenga when I called him and mentioned this problem to him yesterday morning.

The first application I have from Mr. Sutter for an adjournment on the basis he was otherwise engaged came in Friday afternoon after a full jury panel had been impaneled here and I had repeatedly told counsel, including Mr. Wilson, we were going ahead on March 29th.

To make matters even worse I do not suppose I would have even heard about the fact that he was on trial in another case had I not on my own motion some ten days before demanded all counsel appear here because I heard rumors, rumors that there might be some difficulty in getting this case started for trial.

MR. MOFFATT: Yes, your Honor, I understand there was a pretrial conference.

THE COURT: That was all done on my motion, not on anybody else's motion.

MR. MOFFATT: Mr. Sutter's engagement was made known to the Court at that time.

THE COURT: But there was no indication at that

time that were were not going to proceed to trial. The indications as I read them, even as I read their meaning today, was that you counsel were going to come in and I gave them a condition under which they could come in and proceed to trial. There was no statement that morning that this was completely unacceptable. That came almost a whole week later. Unfortunately I cannot deal with new counsel. They have not appeared in this case.

This Court is left holding the bag with jurors impaneled and sitting and waiting for this trial to commence and with no excuse that I can see for not being prepared to go ahead.

MR. MOFFATT: Well, Judge, we are hopeful that perhaps counsel that have indicated that they would like to be substituted would in fact be substituted. This would avoid the tremendous conflict that we presently face on order from your Honor and possible contempt and an order from Judge Samenga to continue on trial there. Hopefully if in fact that discussion could be effected this would accomplish and serve the ends of justice.

THE COURT: I do not know, I am not going to tell you how to proceed. All I know, as far as I am concerned this case should proceed. The Court of

Appeals has said that he is entitled to new counsel and new counsel is entitled to a continuance or should be entitled to a continuance for a week. However, that does not excuse Mr. Sutter's conduct in the premises as I see it, which is the cause of delay and the cause of disruption to the Court's calendar.

This Court explained to others when you were not present.

This Court, as the other judges in this district all have heavy calendars and are confronted with the speedy trial rule here.

MR. MOFFATT: Judge, we have the problem in Nassau County now of a very important witness by the People, who has a very serious illness.

THE COURT: I understand that but, counsel, sympathetic as I may be to your cause and the fact that you find yourself currently on trial, the fact is that no such problem was presented either to Judge Samenga or this Court.

MR. MOFFATT: Judge, I was under the understanding this Court had been advised Mr. Sutter was actually engaged.

THE COURT: This Court was first advised on March 19th and that was the date, as I said to you

a moment ago when this Court on its own motion, not on the motion of your client or anybody else, demanded that the attorneys appear because it had heard rumors to the effect there might be some difficulty in getting the case started on March 29th. I wish to make it very clear at that time, indeed this whole thing as I see it, would never have been brought to this Court's attention until last Friday if I had not anticipated the fact there might be a problem. I tried to anticipate so we would avoid this problem for you and any of the others. But I have had no cooperation from anybody on it.

MR. MOFFATT: Judge, to the extent that we have contributed I apologize on behalf of Mr. Sutter and myself, but we have been daily and nightly actively engaged in another matter.

THE COURT: If you are going to undertake a murder trial at the beginning of March --

MR. SUTTER: Attempted.

THE COURT: Attempted murder at the beginning of March --

MR. MOFFATT: Nonjury.

THE COURT: In my book if you are going to fulfill your professional responsibility you must first inform the Court before whom you are undertaking

such a trial of your engagement in this court and, secondly, you must inform this Court that you are undertaking that engagement. Had that been done, then I am sure, first, Judge Samenga would have been able to work out a modus viviendi. Second, I would not have if I determined Judge Samenga should proceed first and take precedence over this case, I would not have rearranged every other attorney who has been involved before me for the last month, rearranged their schedules and holidays and times to try their cases so as to make room for this particular case. If you had been here over the last month you would understand what I am talking about. I have repeatedly advised the attorneys, including the United States Attorney's office which has been clamoring in certain cases to proceed, that I had made a commitment to Mr. Slater and other very busy defense attorneys and I was going to keep that commitment.

That commitment, I have advised them, might last from a month to three months and I did set aside my calendar for that purpose.

I also advised the Chief Judge, when he asked me, because he was not able to get some other judge to take a very important 90-day case, a jail case, and they were about to let the man go through because

they were running against the 90 days, that I could not take that case for trial because of this case and that I had made such commitment.

Don't you understand what I am talking about when I lay that kind of problem out before you? If you don't, then you do not understand what we are dealing with here.

MR. MOFFATT: Judge, I do. Hindsight, unfortunately, is better than foresight.

THE COURT: It is not hindsight, it is common courtesy, it is common courtesy not only to this Court but all his fellow lawyers at the bar.

MR. MOFFATT: Well, Judge, could I just suggest again the possibility of consideration now by our client here of a possible substitution at this point so it would not interfere unduly, any more unduly, with this Court and also the present engagement that Mr. Sutter is engaged inand inwhich he is directed to continue in Nassau County.

THE COURT: You can propose any solution you wish.

MR. SUTTER: May I be heard for one moment?

THE COURT: If it is agreeable to your counsel.

MR. SUTTER: May I speak?

MR. MOFFATT: Sure.

MR. SUTTER: If your Honor please, I received a telephone call last evening from Mr. Harold Borg, an attorney from Queens County, who says that he is ready to try a case and was ready yesterday to try a case before your Honor involving perjury. I do not know the defendant's name -- his associate or partner --

THE COURT: There are two perjury cases that Mr. Jay has. Mr. Jay has asked for a three-week adjournment because he had gotten sixty hours of tapes.

MR. SUTTER: Mr. Borg told me his associate was ready to go in that case.

THE COURT: He did not make that representation to the Court.

MR. SUTTER: I did not know.

Well, I want to tell you something, Judge. I am a trial attorney. I make my livelihood trying cases. A previous counsel walked out on this defendant. We had four days to prepare the case. We worked day and night. I was assured by both Mr. Irace and the Court that the case would take no longer than two weeks because it is a very simple case. It involves whether or not this defendant tried to kill two police officers. The incident was instantaneous. But I find myself in the position where the prosecuting

attorney has taken over a week to try and get guns in evidence and he cannot still get them in evidence because he does not establish continuity.

I cannot lay down for this man who faces two life sentences -- I don't know how he can serve them but that is what the charge calls for, plus innumerable other counts.

When I took this obligation I was very mindful of my obligation to this Court and I think your Honor knows very, very well that each time anybody was required to be here that Mr. Wilson or somebody else from the firm appeared. I do not intend to be discourteous to the Court. I do not intend to shirk my responsibilities but I have other responsibilities, too.

Mr. Rastelli was advised our our difficulties and he has retained new counsel. They are ready and willing and able to come in on Thursday and all we are asking now at this point is that the matter be adjourned until Thursday. They are busy counsel who are present today here and they ask that they be relieved of the responsibility of coming in tomorrow and that the case commence on Friday. That is all we are asking for.

Judge, I have a tremendous thing out there

in Nassau County on my shoulders. It is not a simple, routine case although we thought it was in the beginning. Somebody had to take it over. I was ordered to trial, I was not requested, I was ordered. And I specifically found out how long it would take because I knew I had to be here on the 29th.

I have to make a living for my family and I figured I could take the two weeks and come in here on the 29th and I just could not because it did not turn out that way.

Your Honor now gives me estimates as to how long this case is going to take. Really, lawyer to lawyer and lawyer to judge, none of us know how long it is going to take, all we can do is estimate. I got my estimate and I gave myself an additional week and it still did not work out.

The way it is shaping up now we are going to be there for another two and a half or three weeks because we have not even got to the ballistics people. We have not gotten to our defendant's case. Those are the vagaries that we deal with.

I never intended to affront this Court. I never intended to shirk my responsibility. It is an unfortunate situation and I accept the responsibility and I ask your Honor at this point to adjourn

this particular case until Thursday when new counsel will come in. They are here and they are prepared to be substituted and Mr. Rastelli desires that substitution, Mr. Philip Rastelli.

If you want to fine me $1,000 a day so be it. I operate at a net loss of $250 a day right now which my wife is unhappy about, I might add.

THE COURT: Well, if it will help, I feel sympathetic for your wife.

MR. SUTTER: My daughter is not too happy, she wants tuition money.

THE COURT: Well, contrary to the report in today's New York Law Journal, this Court has never indicated either yesterday or today that I had any intention of defying the Court of Appeals. Contrary to that report, this Court has never had any intention of defying the Court of Appeals and I have no such intention today. This Court said yesterday that it felt that the responsibility for the failure to communicate was you, Mr. Sutter, and I still have not heard any reason why this Court was not apprised of the appropriate facts and Judge Samenga was not apprised of the appropriate facts until Friday afternoon last week. That to me is not satisfactory.

MR. SUTTER: I will be delighted to explain that

if I may, your Honor.

Number one, when this Court called counsel on the 19th I had assumed, and I think with some reasonable basis, that Mr. Wilson had advised you I was actually engaged on trial, that the trial was not progressing as rapidly as we thought it was and I would not be available.

Further at this point, I knew from speaking with Mr. Wilson and from speaking with Mr. Rastelli on the telephone, that new counsel was stepping in. I knew at that point that there would be some necessity for a slight delay. I felt sure in my own mind that you would be advised of the problem. Therefore, I did not communicate because I had a member of my firm here and I assumed he had communicated with you concerning that problem.

Judge Samenga was not advised of the engagement. We were told it would be a two-week trial and there was no necessity, sir.

I might also point out I have to get in touch with Judge Judd if I am going to have to try this case and I do not assume I will, because Mr. Rastelli desires new counsel to represent him, but if I were to be put on here, I have a certificate of engagement on the last of the Watergate cases for April 26.

I am sure we have concurrent jurisdiction between the parts of this court.

THE COURT: Well, I am not going to tell you how to practice law. Certainly if you were confronted with the trial of this case and you had an engagement before Judge Judd I would apprise him of it forthwith, I would not wait until the boom was lowered.

MR. SUTTER: As you have done.

THE COURT: As has happened here.

MR. SUTTER: Judge, I can assure you after yesterday I am going to write letters all the time.

THE COURT: Well, maybe something has been learned.

Let me go back to counsel. Is there anything further you wish to put on the record here?

MR. MOFFATT: Nothing further other than respectfully request that the Court give consideration to adjourning the matter until Thursday so new counsel can be substituted and the trial in Nassau can continue and the matter before this Court can continue.

THE COURT: Is a representative from the new firm here?

MR. SUTTER: Yes, your Honor

MR. LANG: I am here, your Honor.

Mr. Philip Rastelli, would seek yet another medical

THE COURT: When you left yesterday, as I recall, there was a statement that your firm felt it would be prepared to appear on Thursday and select the jury.

MR. LANG: I said yesterday that we could come in to the case on Thursday, yes.

THE COURT: This is what you felt was adequate time with your preparation?

MR. LANG: I do not want to go that far, I did not say that. I said we would come into the case on Thursday and select the jury and go ahead on Monday.

#3 THE COURT: Is it inconsistent with your request that you made of the Court of Appeals? The Court has requested me to accord you such time as you need up to April 5th to prepare your case. As I indicated a moment ago, if you were listening, I never made the statement that was attributed to me,and I do not know by whom, in the New York Law Journal this morning, that I was going to defy that request. I have no such intention and the reason I ask you the question consistent with your application to the Court of Appeals, are you going to be prepared on Thursday morning?

MR. LANG: Yes, to select the jury and opening statements, your Honor, yes.

THE COURT: So that would be adequate time for you?

MR. LANG: Judge, the answer is yes for us to come in Thursday and to start the case.

THE COURT: Well, I want to make sure that there is no question about it, that there is going to be no claim you have been short-changed on time.

MR. LANG: If I could get a month I would be delighted.

THE COURT: You did not even apply to the Court for a month, you applied for April 5. My question is, consistent with your application to the Court of Appeals, is Thursday sufficient time?

MR. LANG: Again, Judge, as I understand it from what was said here the other day, if we open or we select a jury on Thursday and opened and it would go over until Monday --

THE COURT: That is right, I will not be sitting on Friday.

MR. LANG: So there is no problem about us coming in on Thursday and selecting a jury and opening and continuing with the trial on Monday.

THE COURT: Indeed, on this Friday I said we had motions and hearings, but I have a judicial conference on Friday that I should attend and I propose to

attend. That is the reason for my unavailability this Friday.

All right, with that being the fact on that aspect of the case, I would still go ahead.

MR. WEINTRAUB: Do I take that statement by Mr. Lang, his firm is stating that they will, they feel they have had adequate time to prepare this case to proceed Thursday with the selection of a jury and Monday with evidence?

THE COURT: That is my understanding of what he says.

MR. WEINTRAUB: I just want to be sure.

MR. LANG: What you are doing, if I may say so, your Honor, respectfully, is that everyone seems to be saying we have got adequate time. I will tell you what adequate time would be -- it would be a month in a type of case like this. We asked for a week and we said we would come in with the week. We will go ahead with the trial as your Honor has suggested, and further than that, I am not complaining about it. I am saying we are going to do it but you keep asking me if it is adequate. You know that is a relative word, Judge, and frankly I have not been in the case except for a couple of days and there is quite a bit of preparation that has

to be done. But we will come in on Thursday and select a jury and then go ahead with the trial on Monday. I do not see where at this point I can really say anything more than that.

THE COURT: I th k what Mr. Weintraub wants to make sure of is that you are not taking this position because this Court is in any way or the Government is in any way forcing you to do so.

I am not defying the request of the Court of Appeals and it was never my intention to do so. Anybody who was here yesterday would have recognized that fact. If you feel from your firm's standpoint, asI told you right from the start, you do not want to come in here until April 5th and commence, that is your decision to make.

Mr. Sutter is counsel of record and he has to take whatever consequences that follow from your decision.

MR. LANG: Judge, respectfully again, I say I think I have made the decision for the firm that we will come in on Thursday and do what we have to do. Why press me on that? I do not quite understand that from anyone.

MR. WEINTRAUB: Excuse me, your Honor, for interrupting. When Mr. Cohen appeared before this

Court he indicated that with a week's adjournment his firm would be adequately prepared to start the trial. What we are asking is, does it make a difference to the firm that we are going to start and select a jury on Thursday instead of Monday, which would give him a week as they requested? If that makes that much of a difference, I would like to know about it now and not find out on Monday.

MR. LANG: It makes no difference. If that is the question, the answer is it makes no difference.

MR. SONENSHINE: Your Honor, may I make a request? It is probably the worst moment in the world to make this request but it is probably the only time I will have to do it. I have a matter in the Southern District of Florida, which should take me down there Thursday. It is a matter of one day, that is all I am asking for.

THE COURT: No.

MR. SONENSHINE: Could we start on Monday?

THE COURT: I am shaking my head negatively and I mean it.

MR. PEACE: May I be heard, briefly? Might we have a conditional adjournment for Monday if we have a Transit strike Thursday? In that case we will get killed in every way. It took me two hours to

drive from my home this morning and it took me longer than that yesterday. I believe I will just not get here on Thursday.

THE COURT: No.

MR. SONENSHINE: I can predict something. Knowing my past run of luck in these matters, if we are scheduled for Thursday and I cannot go to Florida, there will be a Transit strike. If we are scheduled for Monday there will not be a Transit strike.

MR. PEACE: Look at the good you can do for the citizens of our community, your Honor, right there by putting it off to Monday and saving the citizens a Transit strike.

THE COURT: We are proceeding at the moment at the earliest possible time. I think I owe that to Mr. Sutter as well as everybody else involved. We are going to proceed on Thursday if that is when they are prepared to come in.

MR. PEACE: Is there a possibility the Court will be closed by a Transit strike, your Honor?

THE COURT: No, there is no such possibility. In the last Transi strike, I know the court was open because I was here trying a case before Judge Dooling during almost the entire Transit strike.

MR. SUTTER: No comment, your Honor.

MR. WEINTRAUB: There is another matter that should be on the record here and I am somewhat reluctant, but it has to come out right now. In trial preparation --

THE COURT: I did not want to get into details now. I am still dealing with Mr. Sutter, I have not finished with that portion of the hearing.

Mr. Moffatt, again, I still have to account for three days with respect to the three-day delay, Monday, Tuesday and Wednesday, you understand that. My question is, do you wish to put anything before the Court respecting that delay?

MR. MOFFATT: No, your Honor. I would request leave, if I may, your Honor, to submit a portion of the trial transcript of yesterday's proceedings seeking a recess to come here this morning. I would like an opportunity to submit that to the Court, which I will do.

THE COURT: You mean the Nassau County trial?

MR. MOFFATT: Yes, your Honor.

THE COURT: Do you have it available?

MR. MOFFATT: Yes, sir. These are the minutes with regard to the recess, your Honor, to appear here.

THE COURT: All right, I will take a few minutes' recess and I will read this if you wish me

to read it at this time and there is nothing further.

MR. MOFFATT: It really adds nothing to what Mr. Sutter has said or I have said. The only additional thing we could do is have Mr. Sutter sworn and take the stand and swear to what he has said.

THE COURT: No, I take Mr. Sutter's representations as an officer of the court, the statements he made as though they were representations made to the Court and I do not think you have to swear an attorney.

MR. SUTTER: May I say one further thing, Judge? Judge Samenga indicated to me when we recessed yesterday if your Honor had any problem as to whether or not I was ordered on that trial on short notice and as to whether or not we indicated that the case would take two weeks -- when I say we I am talking about the prosecutor and the court -- that if your Honor would be gracious enough to call and confirm that --

THE COURT: I believe he confirmed it to me yesterday. That is not the point with which I am concerned. I think I made that clear.

MR. SUTTER: Judge, I understand I am responsible for the action of any of my associates and junior partners. I accept that responsibility. But there has to be some reason and logic when you deal lawyer to lawyer. I assumed this Court was advised

of my engagement and I have reason to believe, if your Honor please, that the "rumor" that your Honor had was implanted by my own firm so that you were apprised, and I think Mr. Wilson is prepared to make a statement as to how your Honor was apprised of the fact that I was engaged on that trial. It came from my firm.

THE COURT: Even assuming that to be the fact, Mr. Sutter, that is no way to apprise the Court, let it be rumored you may not be available.

MR. SUTTER: It was not rumored, Judge, somebody was told about it.

THE COURT: Well, I think I have stated my position pretty clearly on the subject. I do not know how I can make it clearer to you.

MR. BORNSTEIN: I have to stand up at this point because of what Mr. Sutter said and simply to reply that there was a point, I believe sometime prior to the 19th, that Mr. Wilson did call me. We discussed several topics,amongst which he indicated to me the possibility that Mr. Sutter was actually going to be engaged. I told him I was going to call the Court on the basis of this and I respectfully did want to mention I know I did so. Whether Mr. Wilson took this to mean he was relieved from the responsibility I do not know, but I did tell him we

were going to be calling for a pretrial conference. There was a subsequent conversation I know as well, where I know with regard to a different matter I suggested Mr. Wilson call the Court directly, but I do know at this point that Mr. Wilson did tell me at least in part about this matter. I told him I would call the Court. I do not know whether he took that as relieving him of the responsibility. I simply wanted to put that on the record.

MR. SUTTER: The minutes that have been handed to you, there is nothing in there of any essence other than what I have said and what Mr. Moffatt has stated, and I do not, your Honor, see any necessity for your reviewing it.

THE COURT: You handed it to me. I assume you handed it to me for some purpose.

MR. SUTTER: Mr. Moffatt did but I do not see the necessity.

THE COURT: Do you want me to read it?

MR. MOFFATT: I will withdraw the minutes, your Honor.

#4 THE COURT: The following is a rough draft of the opinion the Court will put in final form.

The Court has heretofore tentatively imposed a fine of $1,000 a day on John J. Sutter, Esq.,

attorney for the defendant Philip Rastelli, for his failure to appear for the trial of the above-captioned case scheduled to commence on March 29, 1976; such fine to run and accumulate on each day that Mr. Sutter fails to appear and proceed with the trial of the case.

Mr. Sutter requested and received a hearing on such tentative fine prior to the same being made permanent.

The history of this case over the past year is important to an understanding of the action taken by the Court.

On March 5, 1975, the indictment herein was filed and ordered sealed by the Court and bench warrants were issued for the production of the individual defendants. On March 6, 1975, the defendants Philip and Louis Rastelli appeared and were arraigned before this Court, and on March 14, 1975, the defendant Petrole appeared and was arraigned. All of said defendants pled guilty and were released on bail.

On March 18, 1975, the Government filed a statement of readiness for trial.

On March 21, 1975, the case was called for a status report and a Certificate of Engagement for the trial was issued to John J. Sutter, Esq., for April 4,

1975, at two p.m. On or about April 2, 1975, this Court received copies of telegrams from Mr. Sutter's office indicating that Mr. Rastelli was in the hospital and these formed the basis for an adjournment of the trial to May 9, 1975.

On May 9, 1975, the defendant De Stefano appeared, was arraigned, pled not guilty and was released on bail and at the request of the defendants the case was adjourned to September 5, 1975 to set a date for trial. In the interim, on May 23, 1975, a pretrial hearing was held and concluded.

On September 5, 1975, the case was called and at the request of the defendants was adjourned to November 10, 1975, when it was adjourned further to November 14, 1975, for trial.

On November 14, 1975, the defendants requested a trial date of January 5, 1976 and the Court granted such request on condition that all counsel be prepared to proceed to trial on that date.

On December 29, 1975, defendant Philip Rastelli, by his attorney John J. Sutter, Esq., moved for a hearing to determine the said defendant's physical capacity to stand trial. On January 2, 1976, this Court ordered that the defendant Philip Rastelli appear at the office of Dr. Michael Weingarten, 45

Pretrial Conference.

East 72nd Street, New York, New York at nine a.m. on January 5, 1976 for a physical examination to determine whether he was capable of standing trial. In a report dated January 15, 1976, Dr. Weingarten advised that said defendant was capable of standing trial.

On January 5, 1976, the case was called for trial and the defendant Philip Rastelli's counsel asked for an adjournment to enable to said defendant to undergo elective surgery and requested that said defendant be retained at the Metropolitan Correctional Center for the said purpose prior to the adjourned date for trial. This request was acceded to by the Court. Both sides requested that the case be adjourned for trial to a date subsequent to March 1, 1976, and at the special instance and request of all the defense counsel, Monday, March 29, 1976 was selected as the date on which the case would be tried. Counsel were informed that this was a definite date for trial and were given Certificates of Engagement for that date.

At no time in any of the foregoing pretrial conferences, requests for adjournment, et cetera, did Mr. Sutter or any representative of his office ever advise the Court that he was not ready for trial in that "preparations had been spotty, to say the

least," or otherwise. Quite to the contrary, the requested adjournments by the defendant Rastelli were all predicated upon his medical condition and no indication was given to this Court that additional time was desired or needed for preparation by counsel for trial.

It should be noted that the Court has been told that the case at bar will take approximately six weeks to try.

Unbeknownst to this Court, on or about February 28, 1976, Mr. Sutter was retained to try the case of People of the State of New York v. Gregory V. Charmont in the Nassau County Court before Judge Alfred F. Samenga and commenced such trial on March 8, 1976. Mr. Sutter not only did not inform this Court of this engage but more importantly did not advise Judge Samenga of his engagement to try the case at bar on March 29 and did not exhibit to him his Certificate of Engagement signed by this Court for such trial. This Court understands that the Charmont trial (a nonjury case) is still in progress and will be continuing for at least two to three more weeks.

In or about the middle of March, rumors to the effect that Mr. Sutter might be "unavailable" to commence the trial in this case and that his client,

Mr. Philip Rastelli, would seek yet another medical adjournment reached the undersigned's chambers and accordingly this Court on its own motion scheduled a further pretrial conference on March 19, 1976, to make sure that counsel understood that no further applications for adjournment would be honored. To and including March 18, no one had advised this Court that there would be any problem in proceeding to trial on March 29, but this Court had advised (1) counsel in innumerable cases that it had made a firm commitment to counsel herein to try this case commencing March 29 and that they must adjust their schedules accordingly, and (2) the Chief Judge and other judges in this court that the undersigned could not take other cases requiring an immediate trial because of such commitment. Moreover, this case was at this juncture the oldest case on this Court's criminal calendar and had been pending for some twelve months, six months more than the required maximum prescribed by the Speedy Trial Act of 1974.

It is true that all other defendants had waived their rights to a speedy trial (including their rights to move to dismiss (under such Act, the Constitution and the rules and plan of this Circuit and Court).

On March 19, 1976, at two p.m. Stephen Willson,

Esq., an attorney in Mr. Sutter's office, appeared and applied for a 30-day adjournment on the startling grounds that:

"Our office and Mr. Sutter who is currently engaged in a murder trial before Judge Samenga in County Court, Nassau County, has not given this case the attention it deserves. I feel, perhaps, I am primarily to blame for not bringing this to Mr. Sutter's attention. Nonetheless, the preparations have been spotty, to say the least. I do not blame Mr. Rastelli for desiring to change counsel, and I hope this Court is not prepared to penalize him for what I feel is my office's neglect."

That therefore Mr. Rastelli wished to discharge Mr. Sutter and retain the firm of Saxe, Bacon & Bolan, P.C., and further that Mr. Rastelli was not physically capable of standing trial and that he should be permitted to proceed with the elective surgery which had still not been undertaken even though the same had been given as an excuse for not proceeding on January 5.

The Court made immediate arrangements for additional medical examinations by the Government physician, Dr. Weingarten, and by the defendant's physician, Dr. Smith, which again proved to be negative

in that they found the defendant capable of standing trial.

With respect to the question of substitution of counsel and further delay, the Court held that such substitution would be permitted but only on condition that new counsel were prepared to proceed with the trial ten days hence on the originally schedule date of March 29th.

On Friday afternoon, March 26th, this Court received an affidavit from Mr. Sutter stating that he was engaged in the above described trial before Judge Samenga in Nassau County and that such trial "should continue for another two and one half weeks."

Mr. Sutter further, in such affidavit, "requested that the trial of the within matter be adjourned for a four-week period to enable your deponent to complete his present engagement on trial and review the preparation had on the within cause."

He also indicated that the defendant was "seeking a substitution of counsel by the firm of Mike Rosen, Esq., though formal substitution has not yet been had as of this date."

Also on Friday, March 26th, this Court was served with a petition for writ of mandamus to the Court of Appeals by the firm of Saxe, Bacon & Bolan,

P.C., seeking a continuance of this matter until April 5, 1976 "in order to enable our firm to come in and represent Mr. Rastelli."

In an affidavit annexed to their petition they averred that they are "attorneys for defendant Philip Rastelli." They have not as yet, however, filed a notice of appearance.

Parenthetically it should be noted that seven days have by this time elapsed since this Court made it clear that such substitution might be had if such firm was prepared to proceed on March 29th. If they had utilized such week's time instead of making applications for an additional week's time presumably they might have been ready on that date.

On Monday morning, March 29th, at approximately 9:15 a.m., the undersigned conferred on the telephone with Judge Samenga and was informed that Mr. Sutter had never advised him of his engagement in this court on March 29th, nor had he ever exhibited to him his Certificate of Engagement.

On Monday morning this Court was also orally advised that the Court of Appeals for this Circuit had denied the petition for writ of mandamus but had earnestly requested that this Court reconsider the "equities, interests and policies" involved.

In the light of the Court of Appeals' request and in the interests of the defendant, Philip Rastelli, this Court must grant up to a one-week continuance. However, since Mr. Sutter's conduct herein has caused a complete disruption of this Court's calendar, has caused the unnecessary adjournment of other cases both before the undersigned and other judges, has inconvenienced the codefendants and their counsel, and has required the unnecessary conventions of a jury panel for this case, this Court felt and feels that it had and has no alternative but to impose, and continue, a fine for each day of delay of the trial in this case caused by such conduct. Accordingly, the Court imposes a fine of $500 a day for each day of such delay, namely, Monday, Tuesday and Wednesday of this week.

So ordered.

#5 MR. SUTTER: Judge, may I have ten days to get a loan and pay the fine?

THE COURT: You certainly may.

MR. SUTTER: Thank you, sir. Am I formally relieved of the case at this point?

THE COURT: I do not believe you are. I predicated it all on Mr. Lang's statement which I assume will be carried forward. I cannot relieve you

until you are actually substituted. If Mr. Lang's statements do not prove to be true, Mr. Sutter, of course --

MR. SUTTER: I am sure Mr. Lang would not misrepresent to the Court.

MR. LANG: I will make a representation to the Court that Saxe, Bacon & Bolan, P.C., will substitute for Mr. Sutter and represent Mr. Philip Bastelli at the trial commencing on Thursday of this week.

THE COURT: Very well.

MR. SUTTER: May I be excused to return to Nassau?

MR. WEINTRAUB: There is one other matter I would like to put on the record before we adjourn this trial.

THE COURT: Does Mr. Sutter have to stay? He has asked to be excused.

MR. WEINTRAUB: No, sir.

THE COURT: You are excused.

MR. WEINTRAUB: There is, your Honor, in the indictment in count five, alleging a substantive Hobbs Act charge. The indictment states, in or about the fall of 1971. We anticipate the proof will be in and about the fall of 1970, your Honor,

and rather than be faced with the variance at trial, which the Government does not think is fatal in any event, we move to amend the indictment to reflect 1970 in count five.

THE COURT: Mr. Peace, whom do you represent?

MR. PEACE: The defendant Petrole, your Honor.

THE COURT: Everybody is represented, all right.

Well, gentlemen, do I hear any objection?

MR. SONENSHINE: I would have to plead surprise. At this moment I do not know whether that is in fact significant or not.

THE COURT: Do you want to have a chat with your client?

MR. SONENSHINE: For whatever good it might do to try to do it in a hurry.

THE COURT: Take your time. The Government wants to know and I want to know, that is what we are here for.

MR. SONENSHINE: If I may have a few minutes to find out what significance such change might have.

THE COURT: You are still on this case, Mr. Newman?

MR. NEWMAN: I have no client to consult with.

(A short recess was taken.)

MR. SONENSHINE: When I said earlier to your Honor that I would request we start Monday rather than Thursday, that I plan to be in the Southern District of Florida, that was not for any trial. I did not want your Honor to think I might be hooked into any trial.

THE COURT: I did not understand it to be as such. You want to go down and attend to a case. I do not know why you cannot call the judge and ask if you can appear on Friday.

MR. SONENSHINE: If I go at all it will be for the purpose of having my client testify before a Grand Jury down there.

THE COURT: Ask if you can come on Friday.

MR. SONENSHINE: With respect to this proposed amendment, I would have to ask your Honor that the United States Attorney make some offer of proof or some statement as to what extent this affects my client, whatsoever, of what evidence he is talking about. If it is evidence that does not affect my client, for which he may have to account in some form, I have no objection. If he is going to offer evidence of a crime committed in an entirely different year, in fact a year later, it may affect my defense here and I do not want that to occur. I represent Mr.

MR. PEACE: In behalf of Mr. Petrole, I would have to plead surprise on such notice, your Honor. I have spoken with Mr. Petrole and it will take him some time to go over in his own mind and his records what his connection if any with the names in the indictment. During the original time we have pretty well eliminated that but to have to go back a year again we may have a problem that would be prejudicial to us.

MR. LANG: I will join in both of the statements made by counsel on behalf of Philip Rastelli, your Honor.

THE COURT: I will leave it up to the Government if at all they wish to reveal anything further at this point. They can assess the risk they run.

I will listen to the evidence and if I feel at an appropriate time during the course of the case there is a basis for your objection I will move on it. That is the risk they take. I am not going to delay the trial for that purpose. They can reveal to you as much as they wish at this point and take such risks as they feel they should.

MR. WEINTRAUB: May I have a moment, your Honor?

The Government has no further comment at all on

this point, your Honor.

THE COURT: At the appropriate time I suggest the defense counsel,at the appropriate time when the evidence, if any, is produced with respect to this particular event, I request you point out to me wherein you claim there is surprise and I will consider it.

MR. SCNENSHINE: Of course I do not know what the evidence is they are referring to.

THE COURT: Neither do I.

MR. SONENSHINE: I would object at this time, your Honor, to protect the record for my client and I will object to such amendment.

THE COURT: I will allow the amendment subject to the objection at the time to determine whether it is well taken or not, in light of the fact you have been given this warning.

Mr. Lang, is it your understanding that you personally are going to try this case or Mr. Rosen or somebody else?

MR. LANG: Well, on Thursday Mr. Cohen will be trying this case that I know. After that it will be either myself or Mr. Rosen. He is now engaged and I do not know what his schedule will be. But Mr. Cohen will be here on Thursday for the selection

of the jury and opening statements and then either Mr. Rosen or myself.

MR. SONENSHINE: I have one further request, your Honor, that the United States Attorney apprise the Court and counsel when he first became aware of the error in the indictment that he is referring to, that is the change.

THE COURT: I do not think he listened toyour request.

MR. WEINTRAUB: Excuse me, your Honor.

THE COURT: Mr. Sonenshine asked you advise the Court and him when you first became aware of the need to change the indictment from 1971 to 1970.

MR. WEINTRAUB: I can state to the Court in reviewing the indictment yesterday as part of my preparation for opening I recalled interviews conducted over the last two months which seemed to be at variance, and upon checking those interviews I concluded in my own mind there was a variance. This would have been yesterday afternoon, Mr. Sonenshine.

MR. SONENSHINE: Again, when knowledge came to him factually even though he did not act upon it.

THE COURT: He said over the last two months.

MR. SONENSHINE: I want to inquire when in

the last two months did the interviews apprise you even though the significance escaped you at the moment that the correct year should be the fall of 1972 rather than 1971 --

MR. NEWMAN: 1970, your Honor, rather than 1971.

MR. WEINTRAUB: I really do not see the relevance of this, your Honor. First of all, I do not think I can give exact dates at this point. Secondly, I do not think it is relevant.

THE COURT: If it appears to become material we can suspend the trial for a few minutes and you can make inquiry out of the presence of the jury.

MR. SONENSHINE: Your Honor referred to the fact that your Honor wanted earlier to be alerted.

THE COURT: Yes.

MR. WEINTRAUB: I would like to withhold the motion to amend, your Honor. I want to make sure first that it is appropriate. It may be legally more appropriate to just allow the variance to come in as a variance. I want to make sure of that.

THE COURT: You are advising counsel now that the evidence that you have appears to indicate the fall of 1970 rather than the fall of 1971?

MR. WEINTRAUB: Yes, sir, for all purposes I certainly want them to be aware of that.

Pretrial Conference.

MR. SONENSHINE: Your Honor, I would ask rather placing the burden on me since I may not in advance know what is going to occur with respect to a particular piece of testimony --

THE COURT: I understand. I will be alert. The prosecutor could certainly advise you at that time that they propose to put in some evidence with respect to this particular transaction. I will try to keep my eyes open and you keep your ears open and between the three of us maybe we can catch it when we are in that state ofthe proceedings.

MR. SONENSHINE: The United States Attorney would be the first to know, he would know in advance what he is going to propound to the witness.

THE COURT: It might even come out in the course of your cross-examination.

MR. SONENSHINE: That is something else that is true.

THE COURT: Anything else, gentlemen?

MR. WEINTRAUB: No, your Honor.

THE COURT: Why don't we discuss right now while we have some time to consider it, what you gentlemen wish to have me ask the jury, if anything, what peremptory challenges you will be satisfied with and I will be satisfied with and whether Mr.

Newman is going to be required to go ahead here at all and other miscellaneous things rather than waste time on Thursday morning.

The Government has just handed me questions for the jurors. I assume none of you defense counsel have similarly prepared questions for the jury.

MR. BORNSTEIN: The proposed voir dire to supplement your Honor's standard questioning --

MR. LANG: Judge, I would like to first have time to look at this; since we are just in this case, to submit any questions may I have tomorrow morning, your Honor?

THE COURT: Yes, I will give you whatever time you feel is necessary. Just bear in mind if you hand them to me on Thursday morning or even on Wednesday late afternoon, since I have an engagement on Wednesday night and I will not be riding the railroad, it might be difficult for me to digest.

MR. LANG: I will try to get it to you tomorrow morning, your Honor.

MR. SONENSHINE: I have not prepared any [illegible] questions and I do not even know I will have to.

THE COURT: You do not have to.

MR. SONENSHINE: What I meant is I do not know that I will have any. If I have they will be rather

probably simple questions, easily decided by your Honor.

THE COURT: You have heard my standard questions. I do ask the standard questions, whether you have been in trouble with the law, whether you have had any relatives working for the Government in law enforcement.

MR. SONENSHINE: I am concerned as to what connections people have with this type of business involved in this case. I do not think they will be very difficult questions that will be involved.

THE COURT: Do you want to put them in writing?

MR. SONENSHINE: I will try to have them not Wednesday afternoon but Thursday morning. As I say, your Honor can glance at the questions and make a determination, nothing heavy will be involved.

MR. NEWMAN: May I inquire of the Court whether somebody is trying to tell me anything? They do not give me anything.

THE COURT: You have joined the club, be patient.

MR. NEWMAN: I have not got the benefit of their wisdom contained in the requests for voir dire. If they are trying to tell me something maybe they will tell me directly.

MR. BORNSTEIN: Mr. Weinstein and I have conferred with David Margolies, still chief of the Brooklyn Strike Force as well as Gerald McGuire, acting deputy chief for the region, and upon their oral authorization we renew the motion we made yesterday to sever the Workmen's Mobile Lunch Association, a defendant in this case.

THE COURT: I assume you do not oppose?

MR. NEWMAN: I am thinking about it. It is the first time I will have the pleasure of sitting here and not having a client to answer to and be free to conduct myself as properly or improperly as I saw fit, Judge. It is a luxury I do not often get.

THE COURT: It is up to you, you are in the driver's seat right now.

MR. NEWMAN: May I have a couple of minutes to think about it, Judge? I am going to consult with my client, Judge.

THE COURT: Assuming Mr. Newman does what he thinks he is going to do, what kind of peremptories do you want, gentlemen?

MR. NEWMAN: Reluctantly,Judge, I have no objection.

THE COURT: The Government's motion is granted.

MR. NEWMAN: Your Honor, just so that at some future day I do not get bollixed down, could they consider a dismissal against the corporation? I hate to get a call saying the corporation is going on trial, Judge.

THE COURT: I assume they have taken the action they have taken advisedly. That is why I gave you the option. If you wish to oppose it, of course, and not run that risk, you may do so.

MR. NEWMAN: I will take the calculated risk, Judge.

THE COURT: That leaves three defendants, as I see it, leaving six for the Government and ten for the defendants collectively.

MR. SONENSHINE: Since we are exercising them jointly, I request your Honor consider particularly in view of the number of counts in the indictment, although they are of a similar nature, whether or not you might grant some additional peremptory challenges.

MR. BORNSTEIN: If so, the Government would ask for a proportional increase.

MR. PEACE: I respectfully suggest nine and fifteen, that would be fair to the Government and fair to us.

MR. SONENSHINE: At least it is divisible by

three, Judge, if nothing else.

THE COURT: I do not know, I have not figured it out mathematically.

MR. PEACE: Each is increased by half.

THE COURT: If we do that why shouldn't we at six and ten?

MR. PEACE: Mr. Sonenshine assumedly would be trying or attempting to expand our peremptory challenges while in no way attempting to delimit the Government. If we expand they are going to expand and in fairness I see nothing wrong with that.

THE COURT: Supposing I gave you seven and twelve.

MR. PEACE: What you give us we will have to take but requesting is something else and I am requesting fifteen and nine.

THE COURT: I am more worried about the extent of our panel. I am told we have a jury panel of 75 and that is not an awful lot of leeway. I suppose I can see what we can do to get more. I suspect we will have to get a few extras because it is going to be a rather lengthy trial.

MR. BORNSTEIN: If I could suggest perhaps the panel should be enlarged. There are any number of people we had asked to be mentioned in the course

of voir dire.

THE COURT: Perhaps we had better wait and see how many jurors we can get.

I am told they can assure us of 115 given the present schedule of other judges picking on Thursday. And I am told if there is a Transit strike they are going to fall short.

I think in the light of that I will reserve and I will bear in mind the fact that you want nine to fifteen. Depending on the number of available jurors, I will do my best to grant somewhere between six and ten or nine and fifteen.

MR. SONENSHINE: What time do we start on Thursday?

THE COURT: Ten o'clock.

MR. PEACE: Does your Honor intend to try the case four days a week?

THE COURT: Four days a week. On Friday you can schedule other matters. If it goes too long I may start trying the case Friday afternoons only. But it is my normal procedure to try a case four days a week and use Friday for motions and hearings and other matters.

MR. PEACE: If that is changed we will have a day or two notice in any event?

THE COURT: Yes.

MR. PEACE: Thank you, your Honor.

(Whereupon, at 12:15 o'clock A.M., the matter was adjourned to Thursday, April 1, 1976 at ten o'clock A.M.)

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Opinion of United States Court of Appeals
for the Second Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

(Submitted March 29, 1976 Decided March 29, 1976)

Docket No. 76-3018

Philip Rastelli,

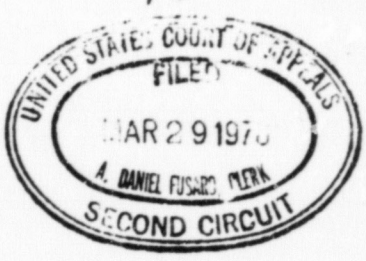
Petitioner,

v.

Hon. Thomas C. Platt, United States District Judge for the Eastern District of New York,

Respondent.

76-3018



Before OAKES and GURFEIN, Circuit Judges, and PIERCE, District Judge.*

PER CURIAM:

A petition for a writ of mandamus has been filed together with a motion for a stay of a criminal trial scheduled to begin this day before the United States District Court for the Eastern District of New York, Thomas C. Platt, Judge. Petitioner was indicted on or about March 5, 1975, for alleged violations of 18 U.S.C.

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* Hon. Lawrence W. Pierce of the United States District Court for the Southern District of New York, sitting by designation.

FPI-Sandstone
3-23-71—10M—8046

§§ 1951, 1961, 1962(c) and 15 U.S.C. § 1. A trial date of March 29, 1976, was ultimately set and the petition alleges that on or about March 15, 1976, petitioner advised the firm of Saxe, Bacon & Bolan, P.C., that he wished it to undertake his defense, although to date there has been no official substitution for prior counsel. Applications made on March 19, 1976, and again on March 24, 1976, for a one-week continuance for the purposes of new counsel being enabled to familiarize themselves with the case were denied. The denials occurred despite the fact that the Assistant United States Attorney consented to and joined in the application for a continuance.

Under Stans v. Gagliardi, 485 F.2d 1290 (2d Cir. 1973), we do not have the power to hear this matter either as an appeal from an interlocutory order or on the within petition for a writ of mandamus; as we said there, the alternative would result in a deluge of applications to the court of appeals "for the postponement of criminal trials, with consequent delay even though few petitions were to be granted." 485 F.2d at 1292.

At the same time, as in the case of Stans v. Gagliardi, supra, we can see no reason for the failure to grant the simple one week's continuance requested. The Speedy Trial Rules have important and significant purposes, to be sure. But these must be carefully weighed against

a defendant's claim of need for a short delay to permit proper preparation, especially where a substitution of counsel in a case involving possible imprisonment for life is concerned. Beyond that here, evidenced strongly by the United States Attorney's consent to the request for a continuance, is the risk to the public that overruling the defendant's claim may, as we said in Stams v. Gagliardi, supra, 485 F.2d at 1291, "undermine a conviction obtained after many weeks of trial."

We deny the petition for mandamus under the law of this court as above stated, but we do so with the earnest request to the trial judge that he reconsider the equities, interests and policies underlying his denial of the request for a continuance.

Petition denied.

Memorandum and Order Appealed From.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA,

-against-

PHILIP RASTELLI, et al.,

Defendants.

75 CR 160

MEMORANDUM AND ORDER

March 30, 1976

- -x

PLATT, D.J.

The Court has heretofore tentatively imposed a fine of $1,000 a day on John J. Sutter, Esq., attorney for the defendant Philip Rastelli, for his failure to appear for the trial of the above-captioned case scheduled to commence on March 29, 1976; such fine to run and accumulate on each day that Mr. Sutter failed to appear and proceed with the trial of the case. Mr. Sutter requested and received a hearing on such tentative fine prior to the same being made permanent.

The history of this case over the past year is important to an understanding of the action taken by the Court.

On March 5, 1975, the indictment herein was filed and ordered sealed by the Court and bench warrants were issued for the production of the individual defendants. On March 6, 1975, the defendants Philip and Louis Rastelli appeared and were arraigned before this Court, and on March 14, 1975, the defendant Petrole appeared and was arraigned. All of said defendants pled not guilty and were released on bail.

On March 18, 1975, the government filed a statement of readiness for trial.

On March 21, 1975, the case was called for a status report and a Certificate of Engagement for the trial was issued to John J. Sutter, Esq. for April 4, 1975 at 2PM. On or about April 2, 1975, this Court received copies of telegrams from Mr. Sutter's office indicating that Mr. Rastelli was in the hospital and these formed the basis for an adjournment of the trial to May 9, 1975.

On May 9, 1975, the defendant De Stefano appeared, was arraigned, pled not guilty and was released on bail, and at the request of the defendants the case was adjourned to September 5, 1975 to set a date for trial. In the interim, on May 23, 1975, a pretrial hearing was held and concluded.

On September 5, 1975, the case was called and at the request of the defendants was adjourned to November 10, 1975, when it was adjourned further to November 14, 1975 for trial.

On November 14, 1975, the defendants requested a trial date of January 5, 1976 and the Court granted such request on condition that all counsel be prepared to proceed to trial on that date.

On December 29, 1975, defendant Philip Rastelli, by his attorney John J. Sutter, Esq., moved for a hearing to determine the said defendant's physical capacity to stand trial.

On January 2, 1976 this Court ordered that the defendant Philip Rastelli appear at the office of Dr. Michael Weingarten, 45 East 72nd Street, New York, N.Y. at 9AM on January 5, 1976 for a physical examination to determine whether he was capable of standing trial. In a report dated January 15, 1976, Dr. Weingarten advised that said defendant was capable of standing trial.

On January 5, 1976, the case was called for trial and the defendant Philip Rastelli's counsel asked for an adjournment to enable said defendant to undergo elective surgery and requested that said defendant be retained at the Metropolitan Correctional Center for the said purpose prior to the adjourned date for trial. This request was acceded to by the Court. Both sides requested that the case be adjourned for trial to a date subsequent to March 1, 1976, and at the special instance and request of all the defense counsel, Monday, March 29, 1976 was selected as the date on which the case would be tried. Counsel were informed that this was a definite date for trial and were given Certificates of Engagement for that date.

At no time in any of the foregoing pretrial conferences, requests for adjournments, etc., did Mr. Sutter or any representative of his office ever advise the Court that he was not ready for trial in that "preparations had been spotty, to say the least" or otherwise. Quite to the contrary, the requested adjournments by the defendant Rastelli were all predicated upon his medical condition and no indication was given to this Court that additional time was desired or needed for preparation by counsel for trial.

It should be noted that the Court has been told that the case at bar will take approximately 6 weeks to try.

Unbeknownst to this Court, on or about February 28, 1976, Mr. Sutter was retained to try the case of People of the State of New York v. Gregory V. Charmont in the Nassau County Court before Judge Alfred F. Samenga and commenced such trial on March 8, 1976. Mr. Sutter not only did not inform this Court of this engagement but more importantly did not advise Judge Samenga of his engagement to try the case at bar on March 29 and did not exhibit to him his Certificate of Engagement signed by this Court for such trial. This Court understands that the Charmont trial (a non-jury case) is still in progress and will be continuing for at least two to three more weeks.

In or about the middle of March, rumors to the effect that Mr. Sutter might be "unavailable" to commence the trial in this case and that his client, Mr. Philip Rastelli, would seek yet another medical adjournment reached the undersigned's chambers and accordingly this Court on its own motion scheduled a further pretrial conference on March 19, 1976 to make sure that counsel understood that no further applications for adjournment would be honored. To and including March 18 no one had advised this Court that there would be any problem in proceeding to trial on March 29th but this Court had advised (i) counsel in innumerable cases that it had made a firm commitment to counsel herein to try this case commencing March 29th and that they must adjust their schedules accordingly, and (ii) the Chief Judge and other Judges

in this Court that the undersigned could not take other cases requiring an immediate trial because of such commitment. Moreover, this case was at this juncture the oldest case on this Court's criminal calendar and had been pending for some twelve months, six months more than the required maximum prescribed by the Speedy Trial Act of 1974.*

On March 19, 1976 at 2PM Stephen Willson, Esq., an attorney in Mr. Sutter's office, appeared and applied for a 30-day adjournment on the startling grounds that

> "our office and Mr. Sutter, who is currently engaged in a murder trial before Judge Samenga in County Court, Nassau County, has not given this case the attention it deserves. I feel, perhaps, I am primarily to blame for not bringing this to Mr. Sutter's attention. Nonetheless, the preparations have been spotty. to say the least. I do not blame Mr. Rastelli for desiring to change counsel, and I hope this Court is not prepared to penalize him for what I feel is my office's neglect."

that therefore Mr. Rastelli wished to discharge Mr. Sutter and retain the firm of Saxe, Bacon & Bolan, P.C., and further that Mr. Rastelli was not physically capable of standing trial and that he should be permitted to proceed with the elective surgery which had still not been undertaken even though the same had been given as an excuse for not proceeding on January 5th.

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* It is true that all of the defendants had waived their rights to a speedy trial (including their rights to move to dismiss) under such Act, the Constitution and the rules and plan of this Circuit and Court.

The Court made immediate arrangements for additional medical examinations by the government physician, Dr. Weingarten, and by the defendant's physician, Dr. Smith, which again proved to be negative in that they found the defendant capable of standing trial. With respect to the question of substitution of counsel and further delay, the Court held that such substitution would be permitted but only on condition that new counsel were prepared to proceed with the trial ten days hence on the originally scheduled date of March 29th.

On Friday afternoon, March 26th, this Court received an affidavit from Mr. Sutter stating that he was engaged in the above-described trial before Judge Samenga in Nassau County and that such trial "should continue for another two and one-half weeks". Mr. Sutter further, in such affidavit, "requested that the trial of the within matter be adjourned for a four week period to enable your deponent to complete his present engagement on trial and review the preparation had on the within cause". He also indicated that the defendant was "seeking a substitution of counsel by the firm of Mike Rosen, Esq., though formal substitution has not yet been had as of this date".

Also on Friday, March 26th, this Court was served with a petition for writ of mandamus to the Court of Appeals by the firm of Saxe, Bacon & Bolan, P.C., seeking a continuance of this matter until April 5, 1976 "in order to enable our firm to come in and represent Mr. Rastelli".*

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* In an affidavit annexed to their petition, they averred that they are "attorneys for defendant Philip Rastelli." They have not as yet, however, filed a Notice of Appearance.

Parenthetically it should be noted that seven days had by this time elapsed since this Court made it clear that such substitution might be had if such firm was prepared to proceed on March 29th. If they had utilized such week's time instead of making applications for an additional week's time presumably they might have been ready on that date.

On Monday morning, March 29th, at approximately 9:15AM, the undersigned conferred on the telephone with Judge Samenga and was informed that Mr. Sutter had never advised him of his engagement in this Court on March 29th, nor had he ever exhibited to him his Certificate of Engagement.

On Monday morning this Court was also orally advised that the Court of Appeals for this Circuit had denied the petition for writ of mandamus but had earnestly requested that this Court reconsider the "equities, interests and policies" involved.

In the light of the Court of Appeals request and in the interests of the defendant, Philip Rastelli, this Court must grant up to a one week continuance. However, since Mr. Sutter's conduct herein has caused a complete disruption of this Court's calendar, has caused the unnecessary adjournment of other cases both before the undersigned and other Judges, has inconvenienced the co-defendants and their counsel, and has required the unnecessary conventions of a jury panel

for this case, this Court feels that it has no alternative but to impose costs for each day of delay of the trial in this case caused by such conduct. Accordingly the Court imposes on Mr. Sutter costs of $500 a day for each day of delay, i.e., Monday, Tuesday and Wednesday, March 29-31* or a total of $1500 payable to this Court.

SO ORDERED.

Thomas C. Platt

U.S.D.J.

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* Messrs. Saxe, Bacon & Bolan, P.C., have represented to the Court that they will be prepared to select a jury in this case on Thursday, April 1, at 10AM.

Notice of Appeal.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76-1194

UNITED STATES OF AMERICA,

- against -

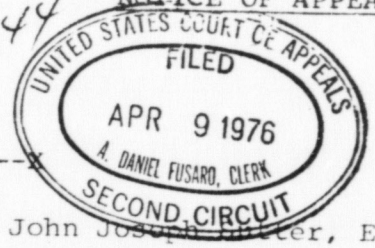
PHILIP RASTELLI, et al.,

Defendants.

75 CR 160

NOTICE OF APPEAL

T-5944



Notice is hereby given that John Joseph Sutter, Esq., the former attorney for the defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the memorandum and order imposing ". . .on Mr. Sutter costs of $500 a day for each day of delay, i.e., Monday, Tuesday and Wednesday, March 29-31 or a total of $1500 payable to this Court." entered in this action on the 30th day of March, 1976.

Dated: April 5, 1976
Mineola, New York

James R. Moffatt

JAMES R. MOFFATT ESQ.
SUTTER, MOFFATT, YANNELLI & ZEVIN, P.C.
Attorney for John Joseph Sutter
Office & P.O. Address
33 Willis Avenue
Mineola, New York 11501

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PHILIP ROSTELLI, et al.,

Defendants,

JOHN JOSEPH SUTTER, Esq.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 951 East 17th Street, Brooklyn, New York
That on May 25, 1976, she served 1 copies of Appendix

on

Hon. DAVID TRAGER,
UNITED STATES ATTORNEY FOR THE
EASTERN DISTRICT OF NEW YORK
225 Cadman Plaza East
Brooklyn, New York.

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Rose Rinella

Sworn to before me this
25th day of May, 1976

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932950
Qualified in Nassau County
Commission Expires March 30, 1977